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Russell Moore; Allison Hopelain;
Es Verdad, LLC, d/b/a Comal;
John Paluska; Andrew Hoffman*

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TIMOTHY BROWN,

Plaintiff,

V.

140 NM LLC, *et al.*,

Defendants.

CASE NO. 4:17-CV-05782-JSW

**DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(1) AND
12(b)(6)**

Date: April 12, 2019

Time: 9:00 a.m.

Courtroom: 5

Judge: Hon. Jeffrey S. White

Action Filed: October 6, 2017

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on April 12, 2019, at 9:00 a.m., in Courtroom 5 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California 94612, Defendants 140 NM LLC, d/b/a Trou Normand; Bar Agricole, LLC, d/b/a Bar Agricole; Thaddeaus M. Vogler; Hopemoorelain, LLC, d/b/a Camino; Russell Moore; Allison Hopelain; Es Verdad, LLC, d/b/a Comal; John Paluska; and Andrew Hoffman (“Defendants”) will, and hereby do, move the Court to dismiss the Second Amended Complaint (ECF No. 123) (“SAC”) filed by Timothy Brown on January 29, 2019, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion is supported by the following Memorandum of Points and Authorities and all exhibits attached thereto, and the [Proposed] Order filed concurrently herewith, the pleadings and papers on file herein, and such other matters that may be presented to the Court at hearing.

RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants request that this Court dismiss Timothy Brown’s Complaint in its entirety.

STATEMENT OF ISSUES TO BE DECIDED

1. Does the Court have subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)?
2. Does Count 1 of the Complaint against Defendants for violation of Section 1 of the Sherman Act state a claim upon which relief can be granted?
3. Does Count 2 of the Complaint against Defendants for violation of California’s Cartwright Act state a claim upon which relief can be granted?
4. Does Count 3 of the Complaint against Defendants for violation of California’s Unfair Competition Law state a claim upon which relief can be granted?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 7, 2019, the Court dismissed Plaintiff’s First Amended Complaint (“FAC”) against all Defendants, and stated in its comprehensive decision, “It is not clear to the Court how

1 Brown will be able to allege a plausible price fixing conspiracy that consists of just four
 2 restaurants, given the number of restaurants in the Bay Area. However, because the Court cannot
 3 say it would be futile, it will grant Brown a final opportunity to amend the complaint solely
 4 against the California Defendants.” *Brown v. 140 NM LLC*, No. 17-cv-05782-JSW, 2019 WL
 5 118425, at *13 (N.D. Cal. Jan. 7, 2019).

6 Given the Court’s clear guidance, one would expect the SAC to include new and
 7 improved allegations against Defendants that would answer the Court’s question. Instead,
 8 Plaintiff’s new “facts” not only fail to demonstrate a plausible price-fixing conspiracy, but
 9 establish as a matter of law that Plaintiff has no Article III standing. In its previous opinion, the
 10 Court found that Plaintiff satisfied the Article III standing requirement by alleging that he
 11 suffered damages by paying more at a New York restaurant than he would have in the absence of
 12 a no-tipping policy. *Id.* at *3. Now, however, Plaintiff concedes that, depending on some
 13 undefined notion of the “quality of his dining experience,” he pays the same or *more* in tips than
 14 the 20% service charge about which he complains. SAC ¶ 33. Plaintiff therefore no longer
 15 asserts that he paid more at any defendant restaurant due to the “no-tipping policy” than he
 16 otherwise would have in the absence of the alleged conspiracy.

17 Plaintiff’s other edits consist of omitting most (but not all) references to the former, now
 18 dismissed, New York restaurant defendants, adding a few conclusory subheadings, and making
 19 vague references to other restaurants in other parts of the country (including the dismissed New
 20 York restaurant defendants), none of which solve the problems which led to the Court’s
 21 dismissal of the FAC.¹ Plaintiff’s supposed “conspiracy” now amounts to a few discussions
 22 among four restaurants out of several thousand in the Bay Area, two of which abandoned their
 23 no-tipping policy soon after they adopted it (and from which Plaintiff made zero purchases). The
 24 Court has already considered and rejected these allegations.

25 Finally, Plaintiff again fails to show that Defendants’ conduct violates California’s
 26 consumer protection statute for the same reasons that his antitrust claims fail. Plaintiff has not

27 _____
 28 ¹ For the Court’s convenience, Defendants attach as Exhibit 1 a document comparing the FAC to the SAC.

demonstrated that Defendants' actions were unfair to consumers, let alone unlawful or fraudulent. The Court should dismiss the SAC for the same reasons that it dismissed the FAC, as well as for lack of standing.

II. STATEMENT OF ALLEGATIONS

A. Parties

Plaintiff Timothy Brown is an individual who purports to represent a nationwide class of individuals "who purchased food or drinks from a Defendant restaurant as early as 2014 during the period when any such restaurant had in place a no-tipping policy and consequently increased its menu prices or added a surcharge." (SAC ¶¶ 13, 66.) As with the previous Complaints, the SAC includes no information regarding Plaintiff's place of residence, although in previous briefing, he admitted that he is a resident of Minnesota. *Brown*, 2019 WL 118425, at *3. While Plaintiff still names all four Bay Area restaurants from his previous Complaints as Defendants, he only alleges that he made purchases at two of those restaurants, one in Oakland and one in Berkeley, both on the same day in 2017 and at no other time. (SAC ¶ 32.) He does not allege facts about what he ate at either restaurant, and only alleges the amount he paid (\$10.93) at one of them. (SAC ¶ 32.)

The SAC names nine Defendants, including four restaurants in San Francisco, Oakland, and Berkeley and five individual restaurant owners in San Francisco, Oakland, and Berkeley. (SAC ¶¶ 14-22.) Plaintiff also adds a sentence about various other unnamed restaurants in other cities across the country, but alleges no connection between these restaurants and Defendants. (SAC ¶ 24.)

B. Plaintiff's Claims

Plaintiff's claims in the SAC are a pared-down version of those found in the dismissed FAC. The specific allegations relating to Defendants are virtually identical to those in the previous Complaint, and Plaintiff adds nothing new to bolster his conspiracy allegations, which are now confined to four Bay Area restaurants. As he did before, Plaintiff alleges that Defendants conspired to raise menu prices, either by increasing menu prices or adding

1 surcharges.² (SAC ¶2.) As before, the SAC alleges no evidence or any details about an unlawful
 2 agreement among Defendants regarding the implementation of tipping policies, and in fact,
 3 Plaintiff deletes a number of the allegations contained in the FAC.

4 Because the New York restaurants were dismissed as defendants, Plaintiff now alleges a
 5 narrow “conspiracy” among four small restaurants in the Bay Area, two in San Francisco, one in
 6 Oakland and one in Berkeley (although Plaintiff again attempts to bring in the New York
 7 restaurants, apparently as unnamed co-conspirators). (SAC ¶¶2, 30, 31, 81.) Plaintiff now
 8 alleges that he tips based on the quality of service at the restaurants in which he dines (SAC ¶33),
 9 but makes no allegations regarding the quality of service at either of the Defendant restaurants
 10 where he purchased food (both purchases were on the same day and Plaintiff appears to have
 11 done so solely for purposes of alleging a purchase as opposed to choosing those restaurants for a
 12 dining experience). Further, as before, the Complaint’s allegations amount to public
 13 conversations (the same as were cited in the FAC) among restaurant owners about the merits of a
 14 no-tipping policy at, for example, trade association meetings, in the media, and in the same
 15 emails to one another referenced in the FAC. (*See, e.g.*, SAC ¶¶35, 37, 40, 51.) The Complaint
 16 offers no new allegations regarding Defendants, and admits that two of the four Defendants
 17 abandoned the “no-tipping policy” at least three years ago.³ SAC ¶ 62.

18 Based on these allegations, which the Court already found insufficient to defeat a motion
 19 to dismiss for failure to state a claim, Plaintiff asserts claims for price-fixing in violation of
 20 Section 1 of the Sherman Act (SAC ¶¶ 77-83) and the California Cartwright Act (SAC ¶¶ 85-
 21 88); and unfair competition in violation of California’s Unfair Competition Law (SAC ¶¶ 90-95).
 22 As before, none of those claims has any merit.

23
 24
 25 ² Plaintiff devotes one paragraph of the SAC to a vague allegation that “dozens” of San
 26 Francisco restaurants are also “colluding on ‘health care’ surcharge.” (SAC ¶ 65.) Because
 27 Plaintiff does not include any details about this unsubstantiated allegation, nor does he allege
 injury or damages for this supposed conspiracy, Defendants do not address it further.

28 ³ Plaintiff fails to mention that one of the four Defendant restaurants, Camino (formerly in
 Oakland), was permanently closed prior to his filing of the SAC.

1 **III. SUMMARY OF ARGUMENT**

2 Plaintiff presents the Court with no new allegations that are sufficient to defeat a motion
3 to dismiss. Plaintiff alleges nothing new with respect to the four restaurant Defendants, two of
4 which no longer utilize the “no-tipping” policy. There are no allegations in the SAC that
5 demonstrate a conspiracy among the Defendants to violate the antitrust laws. Further, Defendant
6 cannot demonstrate injury because, as the Court previously held, he does not allege that he
7 would have paid less than the 20% surcharge he paid at one of the restaurants (which he visited
8 on one occasion in 2017).

9 **IV. ARGUMENT**

10 **A. Plaintiff Fails to Allege Article III Standing**

11 Before proceeding to the merits of Plaintiff’s claim, the Court must first determine
12 whether Plaintiff has sufficiently established Article III standing. *Gerlinger v. Amazon.com Inc.*,
13 526 F.3d 1253, 1255 (9th Cir. 2008) (standing is a “jurisdictional prerequisite”); *In re Capacitors*
14 *Antitrust Litig.*, 154 F. Supp. 3d 918, 924 (N.D. Cal. 2015) (standing is a “threshold inquiry” for
15 any case, including class actions). Plaintiff must show that he “(1) suffered an injury in fact, (2)
16 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
17 redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547
18 (2016). In other words, Plaintiff must affirmatively plead facts demonstrating “an invasion of a
19 legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not
20 conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
21 (internal citations and quotations omitted); *see also Monsanto Co. v. Geertson Seed Farms*, 561
22 U.S. 139, 149 (2010) (“plaintiff bears the burden of demonstrating that her injury-in-fact is
23 ‘concrete, particularized, and actual or imminent’”).

24 Plaintiff also again seeks injunctive relief. As this Court stated when dismissing
25 Plaintiff’s request for injunctive relief in the FAC, “To show he has standing to pursue injunctive
26 relief, Brown must ‘demonstrate that he has suffered or is threatened with a ‘concrete and
27 particularized’ legal harm, coupled with a ‘sufficient likelihood that he will again be wronged in
28

1 a similar way.” *Brown*, 2019 WL 118425, at *3 (*quoting Bates v. United Parcel Serv.*, 511 F.3d
2 974, 985 (9th Cir. 2007) (internal quotations omitted)).

3 As a class representative, Plaintiff must show that he personally has been injured, not that
4 injury has been suffered by some unnamed class member whom Plaintiff claims to represent. *In*
5 *re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007) (dismissing state
6 law claims based on law of states where no named plaintiff resided) (*quoting Lewis v. Casey*, 518
7 U.S. 343, 347 (1996)). The named plaintiff must have standing with respect to *each* claim the
8 class representative seeks to bring. *Ditropan*, 529 F. Supp. 2d at 1107 (citations omitted).
9 Otherwise, the Court “lacks jurisdiction over the claim and must dismiss it.” *Capacitors*
10 *Antitrust Litig.*, 154 F. Supp. 3d at 925.

11 This Court dismissed Plaintiff’s request for injunctive relief, stating, “Brown is a resident
12 of Minnesota, and he does not allege that he intends to dine at any Defendants’ restaurants in the
13 immediate future.” *Brown*, 2019 WL 118425, at *3. Plaintiff alleges no new facts in the SAC
14 that would cause the Court to revisit its ruling, and his request for injunctive relief should again
15 be dismissed. Indeed, Plaintiff alleges only that he dined at two of the four Defendant
16 restaurants on one occasion, both on the same day in 2017, one of which is now permanently
17 closed.

18 With respect to standing to assert a claim for damages, the Court previously held that
19 Plaintiff established standing to seek damages because he “alleges that he paid \$5.00 more for a
20 fried-chicken sandwich than he would have absent the alleged price fixing conspiracy.” *Id.* That
21 allegation, of course, related to Plaintiff’s experience at a **New York** restaurant. Although
22 Plaintiff still includes the allegation regarding the \$21 chicken sandwich he bought in New York,
23 that fact is irrelevant as to the California Defendants. Instead, Plaintiff now asserts that he has
24 standing because he purchased food from two Defendants, Comal and Camino.

- 25 • With regard to Comal, Plaintiff does not state how much he paid, only that a 20%
26 service charge was added to the bill in lieu of a tip. (SAC ¶32.) He does not
27 allege what he bought or what he would have tipped but for the service charge.
28

- With regard to Camino, Plaintiff alleges he bought a \$10.93 meal, that service was included and that there was no tip line on his bill. *Id.* Plaintiff does not state whether Camino's service surcharge was 20% or some other amount.

Plaintiff then states that he "generally tips in an amount tied to the quality of his dining experience, sometimes at 20%, but often less, and occasionally more" (SAC ¶ 33), but makes no allegations regarding the quality of service at either Camino or Comal beyond making a documentary record for his complaint. Of course, Plaintiff can offer no allegations regarding the other two Defendant restaurants (Bar Agricole and Trou Normand) where he chose not to dine and, instead, reports that they both went back to tipping in 2016. (SAC ¶ 62.)

These allegations come nowhere near the level of specificity needed to establish a concrete and particularized legal harm. Because Plaintiff fails to meet his burden of alleging standing, the Complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). *See Stahl Law Firm v. Judicate W.*, No. C13-1668 TEH, 2013 WL 6200245, at *3 (N.D. Cal. Nov. 27, 2013) (lack of Article III standing requires dismissal for lack of subject matter jurisdiction) (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011)).

B. Plaintiff Again Fails to Plausibly Allege Antitrust Claims

Even if the Court finds that Plaintiff has standing, the Second Amended Complaint must be dismissed for failure to state a claim. In dismissing Brown's FAC, the Court stated:

Because Brown alleges the California Defendants raised menu prices (by some unspecified amount) and added a 20% service charge to their menus, it is not clear to the Court which prices he contends are fixed. If it is the menu prices, the email he relies on does not contain allegations about increasing menu prices. Brown does not include any other allegations from which the Court can infer that the California Defendants agreed to increase menu prices, let alone agreed to a uniform increase in prices. If it is the service charge, the Court concludes he has not alleged facts showing he was injured by that practice because he does not allege he would have paid less than 20% as a tip.

Brown, 2019 WL 118425, at *13.

As before, "Brown must allege facts that show (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities

1 intended to harm or restrain trade or commerce among the several States, . . . (3) which actually
 2 injures competition.” *Id.* at *10 (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th
 3 Cir. 2008)). “Additionally, Brown must allege facts that show he suffered antitrust injury, *i.e.*,
 4 loss or damage ‘of the type the antitrust laws were designed to prevent and that flows from that
 5 which makes defendants’ acts unlawful.’” *Id.* at *11 (*quoting Cargill, Inc. v. Monfort of Colo.,*
 6 *Inc.*, 479 U.S. 104, 113 (1986) (internal quotes omitted); *see also Glen Holly Entm’t, Inc. v.*
 7 *Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003). Plaintiff again fails to do so.

8 Now that the New York restaurants have been dismissed with prejudice, Plaintiff must
 9 allege sufficient facts to show that four Bay Area restaurants (only two of which are in the same
 10 city) entered into a price-fixing conspiracy that restrained competition not just in California, but
 11 in other states as well, and injured Plaintiff. He does not even come close. Plaintiff’s allegations
 12 regarding a conspiracy that reaches beyond California amount to (1) a few vague and conclusory
 13 sentences about unnamed restaurants in other states; and (2) many of the same allegations
 14 regarding the New York defendants that this Court considered and dismissed. Further, Plaintiff
 15 has again failed to plausibly allege that “Defendants agreed to increase menu prices, let alone
 16 agreed to a uniform increase in prices.” *Brown*, 2019 WL 118425, at *13. Nor has Plaintiff
 17 alleged facts showing he was injured by any service charge “because he does not allege he would
 18 have paid less than 20% as a tip.” *Id.* Indeed, Plaintiff now admits that he sometimes tips more
 19 than 20% and sometimes exactly 20%, based on the “quality of his dining experience.” (SAC ¶
 20 33.)

21 As stated above, Plaintiff’s new allegations in the SAC are few. He includes a
 22 conclusory allegation that a “significant number” of restaurants (in the Bay Area and elsewhere),
 23 instead of a “handful,” (FAC ¶2) conspired to increase prices by “around” twenty percent, “either
 24 by adding a surcharge or increasing menu prices.” (SAC ¶ 2.) He supplements a few additional
 25 sentences from the same emails among the Bay Area restaurants that the Court found insufficient
 26 to defeat a motion to dismiss, none of which further his conspiracy allegations. The rest of
 27 Plaintiff’s new allegations are mostly conclusory statements with no factual support.

Plaintiff's vague and imprecise allegations of agreement are, as before, insufficient to state a conspiracy claim.⁴ *See, e.g., Kendall*, 518 F.3d at 1048 (affirming dismissal because complaint "does not answer the basic questions: who, did what, to whom (or with whom), where, and when?"); *LAI v. USB-Implementers Forum, Inc.*, No. CV 14-05301-RGK (PJWx), 2014 WL 12600969, at *4 (C.D. Cal. Nov. 21, 2014) (dismissing complaint because conspiracy claim was "nothing more than a legal conclusion"); *Credit Bureau Servs., Inc. v. Experian Info. Sols., Inc.*, No. SACV 12-2146 JGB (MLGx), 2013 WL 3337676, at *8 (C.D. Cal. June 28, 2013) (dismissing complaint that did "not allege whether there were one or multiple agreements, the form those agreements took, who executed them, or when or where they were enacted"); *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043 MMM (SSx), 2007 WL 4976364, at *10 (C.D. Cal. Oct. 29, 2007) (dismissing complaint because plaintiff did not allege when, how, or by whom the purported agreement was made, nor did plaintiff identify the parameters of the agreement), *aff'd*, 323 F. App'x 571 (9th Cir. 2009); *see also In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015) (rejecting at the pleading stage allegations of parallel conduct where Defendants adopted similar policies).

With respect to injury, the Court held that Plaintiff failed to show he was injured because he did not allege that he would have paid less in tips than the 20% service charge. Instead of remedying that error in the SAC, Plaintiff doubles down and alleges that he sometimes pays more than 20%, sometimes 20% and sometimes less. This is even less evidence of injury than the Court was presented with (and dismissed) in the FAC. Plaintiff's failure to demonstrate that he (and competition) were injured is another reason for dismissing the SAC.

C. **Plaintiff's Cartwright and UCL Claims Also Fail**

As the Court previously found, the viability of Plaintiff's Cartwright Act and UCL claims hinge on the viability of the Sherman Act claim. *Brown*, 2019 WL 118425, at *10 (citing *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007)). Because Plaintiff has

⁴ Plaintiff again alleges a *per se* conspiracy, but as stated in Defendants' previous briefing, Plaintiff fails to allege either a *per se* or rule of reason claim. Nothing in the SAC changes that analysis.

1 failed to plausibly allege a conspiracy among Defendants that caused him antitrust injury, those
 2 state law claims must also fail, as they did before. This is especially the case because Plaintiff
 3 fails to bolster his state law claims with any additional allegations, instead choosing to plead
 4 identical allegations as he did in the FAC that the Court dismissed. Because Plaintiff has again
 5 failed to allege a viable Sherman Act claim, his state law claims must also be dismissed. *Ismail*
 6 *v. Wells Fargo Bank, N.A.*, No. 2:12-CV-01653-MCE, 2012 WL 5425175, at *5 (E.D. Cal. Nov.
 7 6, 2012).

8 Since the Cartwright Act claim fails, Plaintiff's UCL claim also fails. *See Gaitan v.*
 9 *Mortg. Elec. Registration Sys.*, No. EDCV 09–1009 VAP (MANx), 2009 WL 3244729, at *11
 10 (C.D. Cal. Oct. 5, 2009) (plaintiff “cannot state a UCL claim based on those predicate violations,
 11 since he has not alleged any ‘unlawful’ activity”); *Krantz v. BT Visual Images, LLC*, 89 Cal.
 12 App. 4th 164, 178 (2001) (UCL claim must “stand or fall depending on the fate of the antecedent
 13 substantive causes of action”).

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court should again dismiss Plaintiff's complaint for lack of
3 subject matter jurisdiction and for failure to state a claim.

4
5 DATED: February 19, 2019

Respectfully submitted,

6 By: /s/ Judith A. Zahid

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CERTIFICATE OF SERVICE

I, Judith A. Zahid, hereby certify that on February 19, 2019, I electronically filed the above document with the U.S. District Court for the Northern District of California by using the CM/ECF system. All participants in the case are registered CM/ECF users who will be served by the CM/ECF system.

/s/ Judith A. Zahid

Judith A. Zahid

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4852-3868-3784v1

EXHIBIT 1

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UNITED STATES DISTRICT COURT
DISTRICT OF NORTHERN CALIFORNIA
OAKLAND DIVISION

Plaintiff,

140NMLLC,

TIMOTHY BROWN,

19

)

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Case No. 4:17-cv-
05782-JSW

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BAR AGRICOLE, LLC,

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THADDEUS M. VOGLER,

HOPEMOORELAIN, LLC,

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RUSSELL MOORE,

ALLISON HOPELAIN,

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ES VERDAD, LLC,

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JOHN PALUSKA,

ANDREW HOFFMAN,

)

**SECOND AMENDED
COMPLAINT**

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v.

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CLASS ACTION

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²² ~~2~~) GROUPBAR AGRICOLE, LLC,)
~~3~~ DANIEL MEYER)
~~4~~ THADDEUS M. VOGLER,)

²³ ~~5~~) HOPEMOORELAIN,)
~~6~~ LLC, RUSSELL MOORE,)

²⁴ ~~7~~) ALLISON HOPELAIN,)

²⁵ ~~8~~) ES VERDAD, LLC,)

²⁶ ~~9~~) JOHN PALUSKA, and)

²⁷ ~~10~~) ANDREW HOFFMAN,)

²⁸ ~~11~~))

²⁹ ~~12~~) Defendants.)

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~~NATE ADLER,~~
~~BIRTH OF THE COOL, LLC,~~
~~MAKE IT NICE, LLC,~~
~~DANIEL HUMM,~~
~~WILL GUIDARA,~~
~~NEW YORK CITY HOSPITALITY~~
~~ALLIANCE, INC.,~~
~~and ANDREW RIGIE,~~

~~Defendants.~~

~~I. INTRODUCTION~~

I. BACKGROUND

1. Every year, American consumers freely ~~and voluntarily pay~~ give over forty billion dollars in

tips to the ~~nation's~~ nation's approximately three million waiters, waitresses, and bartenders. Tipping is

a private

voluntary transaction between the customer and the server. Tips are the legal property of the employee. As discussed herein, however, restaurant owners ~~are in the Bay Area and elsewhere~~ are

engaged in a sophisticated unlawful conspiracy to increase prices and ~~take~~ eliminate tips ~~from~~ servers.

2. In the fall of 2014, a ~~handful~~ significant number of Bay Area restaurants agreed "as a group" to ~~eliminate~~

~~eliminate~~ tipping and increase prices by around twenty percent, either by adding a surcharge or increasing menu prices. They are part of a larger conspiracy

~~28~~ spearheaded by the Union Square

Hospitality Group out of New York City, together with its

founder and Chief Executive Officer

Danny Meyer. The ~~conspuacy is m~~ conspiracy is in its early

~~experimental~~ stage, focused on developing and disseminating

best practices for ~~switching to a~~

~~raising prices and implementing a~~ no-tipping, ~~"hospitality-included"~~ business ~~model~~

~~developed by vanguard restaurants. The no-~~

~~model.~~

3. The no-tipping

movement is, in the estimation of many, the most significant issue in the restaurant industry

today. One conspirator predicts that ~~"ten years from now we're-we're~~ going to look back and go,

~~'Oh, God 'Oh, G-d, do you remember when we used to tip?"~~ The ~~conspirators refer to the no-tipping~~ hope and

~~movement as "the tipping point," with the clear implication expectation is that there may soon be enough~~

restaurants ~~making~~ will make the switch to establish the ~~"critical mass"~~ necessary for the movement to

~~"catch fire" on a much larger scale~~ and become the new industry norm. Industry

~~insiders cleverly refer to that moment as the "tipping point."~~

4. Participating restaurants have disingenuously portrayed the no-tipping movement as intended to promote social justice and equality, ~~though when~~ the real aim and effect is greater profit at the expense of workers and consumers. Their owners have said that the goal is to reduce pay

disparity between front of the house ("FOH") workers, such as servers and bussers, who

customarily receive tips, and back of the house ("BOH") workers, such as cooks and

dishwashers, who do not receive tips. Owners pay what the market dictates, so they recognize

that increases in the minimum wage will force them to pay all workers more, and they are

looking for a new revenue stream to pay the increased costs in a way that protects their bottom

5. The “problem” from the owners’ perspective is that servers make \$25-\$35 per hour and

more including tips, and good servers could be hired for substantially less if one could, through

collusion, effectively prevent them from working elsewhere where tips are still permitted. As pointedly noted at a “no-tipping” industry conference in 2015, defendant Hopelain said: “There’s not that much money to be made in the restaurant business, and the waiters cannot make all of it.”

6. Owners have said that the extra revenue from switching to a no-tipping model will be used only to pay wages. This is meaningless from an economic perspective; it is comparable to saying that the extra revenue will only be used to pay for food, or to pay rent. Directly or indirectly, the extra revenue from the elimination of tipping increases profit, or reduces loss.

7. The antitrust laws prohibit concerted action that unreasonably restrains competition.

Restaurants may unilaterally increase prices and/or ban tipping without violating the antitrust laws. Such unilateral action, however, may be difficult to sustain because the resulting loss of customers and servers to competitors may render the change unprofitable. It is alleged herein that Bay Area restaurants took the sustainable approach by raising prices in concert, in violation of antitrust restrictions.

8. The charged conspiracy constitutes a *per se* unreasonable restraint of trade, in violation of the Federal Sherman Act, and the California Cartwright Act, and the New York Donnelly Act. The purported motives of the participants or any asserted reasonableness of the conduct or increased prices is immaterial

because there is a “conclusive presumption that [horizontal

price fixing] is unreasonable."¹ To
establish liability, an impacted consumer need ~~show~~ prove only

~~2~~ the existence of an agreement or
understanding to fix prices, formal or informal, and that each

~~3~~ defendant knowingly joined the
agreement. ~~Whether all it is the participants understand that their~~

~~conduct is unlawful is irrelevant to liability.~~

~~6. As discussed herein, there is substantial direct evidence of a common purpose and
concerted action that is, a conspiratorial agreement including emails between and among~~

~~some defendants in which they acknowledge the existence of a joint effort to increase prices,
as well as meetings among defendants at which the implementation of a no-tipping policy was~~

~~discussed, followed shortly by participants implementing the policy. As some defendants
acknowledge and bemoan, coordinated action, rather than uncoordinated, independent action,~~

~~is necessary to the long-term success of their common plan.~~

~~7. Conspirators recognized the advantage of making the switch as a group as a way to
retain servers, whose income is reduced under the new policy, and whose inclination to flee to
another tipping restaurant is a natural result of the loss of tip income, as well as minimizing~~

~~"sticker shock" on the part of diners if higher menu to fix prices were more ubiquitous. As one in
concert that constitutes the violation. In the~~

~~defendant said "What is it going to take presence of direct evidence of such an agreement, as
herein alleged, circumstantial evidence of,~~

~~for example, the industry to change ... One timing of effectuation of the big things that~~

~~is holding people back ... they don't want agreement, is not required to be the test case where we
get rid of tipping ... our either alleged or~~

~~tipped employees will get a straight hourly wage which will reduce their hourly rate and then~~

~~they are going to work across the street at my competitor. And that just really seems to be the~~

23 9. Because price-fixing conspiracies are, by their nature, conducted in secret, typically
24 only circumstantial evidence of collusion is available at the pleading stage. As described
25 herein, there is substantial direct evidence of the charged conspiracy, including unambiguous
26 emails among the conspirators setting and acknowledging their agreement to increase prices.

27 ¹Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343-44 (1982). See also National
27 ²⁷Society of Professional Engineer v. United States, 435 U.S. 679, 692 (1978) (*per se* rule
reaches

to ““agreements whose nature and necessary effect are so plainly anticompetitive that
28 ²⁸no elaborate study of the industry is needed to establish their illegality.””)

Both the volume and the striking quality of such evidence of collusion set this case in a stronger posture relative to most other antitrust conspiracies at the pleading stage. Formal discovery is expected to uncover additional evidence.

10. The conspirators recognize the importance of concerted action, both from the perspective of not upsetting customers and of retaining servers. As one co-conspirator said -- "What is it going to take the industry to change ... One of the big things that is holding people back ... they don't want to be the test case where we get rid of tipping ... our tipped employees will get a straight hourly wage which will reduce their hourly rate and then they are going to work across the street at my competitor. And that just really seems to be the big challenge and I don't know if there is really any one way that enough restaurateurs at one time are going to make a switch and say we're going to move from tipping ...".

8. Restaurants did lose servers as a consequence of the switch, many of whom were making well in excess of \$40 per hour including tips. However, the restaurants could hire as replacements competent servers willing to work for \$20 or less per hour. The difference ends up in the pockets of the owners. At a "no tipping" industry conference in 2015, defendant Hopelain said: "There's not that much money to be made in the restaurant business, and the waiters cannot make all of it."

9. If the industry is to change to a gratuity-free model over the long term -- the express goal of the conspiracy -- and the so-called "new restaurant" is to be recognized as the norm, the change ideally and perhaps necessarily begins with a core group of restaurants respected in the industry to drive the movement forward. New York City and San Francisco are in the estimation of many the two most significant markets in the restaurant industry in the United States, and Union Square Hospitality Group, which owns about fifteen successful restaurants, is perhaps the best known and most respected restaurant group in New York City. Meyer is a rock star in the industry, nationally recognized by *Nation's Restaurant News* in 2016 as

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~~number of chefs, owners, and servers who are not only setting trends today, but~~

~~also shaping them for tomorrow."~~

~~Key to success of the "new restaurant" is active, using substantial, resources and sophisticated efforts~~

~~to market the new system to restaurants expertise to facilitate the formation and operation of the conspiracy in local geographic markets throughout the United States. This is done in part~~

~~through the media—which has almost without exception supported and promoted the no-~~

~~tipping model—and through social media, such as the Twitter hashtag #hospitalityincluded, as~~

~~well as industry conferences and meetings to get the word out and to assist restaurants in~~

switching to a no-tipping model. Meyer and other USHG representatives have traveled around

the country to promote the Danny Meyer stated in 2016 that he believed that “hospitality included model at industry events. Substantial

collaboration between the New York and San Francisco restaurant markets, including the sharing of “best practices” and lessons learned, increases the likelihood of success in both markets, and beyond.

This action is brought on behalf of a putative class of consumers. Pursuant to law,

persons overcharged as a result of a

included” “would not succeed unless our industry would convert,” that “many, many”

restaurants have converted, that “we have a team of two or three people spending a lot of their time going on ... industry panels talking about how we’re doing it” and that “we have invited industry members to our town hall meetings” to discuss and consult on “hospitality included.”

12. Whether such price-fixing conduct operating across geographic markets is part of a

larger conspiracy are entitled to recover triple their is a question of fact. There is no legal requirement that all conspirators must

damages plus costs and reasonable attorney's fees. Injured servers and other customarily-tipped employees may also have a viable claim for treble damages.

19 compete with all other conspirators, and market definition is not an element of a *per se* price-
20 fixing case. Any-sized segment of an industry that engages in concerted price-fixing is liable
21 under federal and state antitrust laws, regardless of whether, and of how many, competitors
22 choose to participate. Additionally, persons and trade associations outside of the Bay Area are
23 liable as participants in a Bay Area conspiracy if they knowingly facilitate and assist in the
24 conspiracy's formation or operation, regardless of whether such persons compete with Bay
25 Area restaurants for customers.

Case 4

III. PARTIES

Timothy Brown (~~"("Brown")")~~) is ~~a named~~the plaintiff and ~~putative~~-class representative in
 13. ~~15~~ this ~~action~~matter.

14. Defendant 140 NM LLC, d/b/a Trou Normand is a limited liability company organized
 under the laws of the State of California, with its principal place of business at 140 New
~~19~~ Montgomery Street in San Francisco.

15. Defendant Bar Agricole, LLC, d/b/a Bar Agricole is a limited liability company
 organized under the laws of the State of California, with its principal place of business
 at 355
 11th Street in San Francisco.

16. Defendant Thaddeus M. Vogler (~~"("Vogler")")~~) resides in California and is
 the owner and
~~25~~ managing member ~~of Trou of Trou~~ Normand and Bar Agricole.

16. Defendant Hopemoorelain, LLC, d/b/a Camino is a limited liability company

organized

under the laws of the State of California, with its principal place of business at 3917

Grand

Avenue in Oakland, California.

18. Defendant Russell Moore ("Moore") resides in California and is an owner and managing member of Camino.

19. Defendant Allison Hopelain ("Hopelain") resides in California and is an owner and managing member of Camino.

20. Defendant ES Verdad, LLC, d/b/a Comal is a limited liability company organized under the laws of the State of California, with its principal place of business at 2020 Shattuck

Avenue in Berkeley, California.

21. Defendant John Paluska ("Paluska") resides in California and is an owner and

managing member of Comal; as well as Comal Next Door, which opened in 2018 as a non-

tipping restaurant.

22. Defendant Andrew Hoffman ("Hoffman") resides in California and is an owner and

managing member of Comal.

~~22. Defendant Union Square Hospitality Group, LLC ("USHG") is a limited liability~~

~~company organized under the laws of the State of New York, with its principal place of~~

~~business at 24 Union Square East in New York City. It operates the following restaurants in~~

~~New York City: Union Square Cafe, Gramercy Tavern, Blue Smoke, Jazz Standard, The~~

~~Modern Cafe, 27 Terrace, Midvale, Utah, and Next Door.~~
~~23 Porehlight, Untitled, Studio Cafe, and Daily Provisions. USHG co-owned the GreenRiverComal~~
~~24 Next Door.~~

~~25 restaurant in Chicago until it closed in January 2018.~~

~~26 23. Defendant Daniel "Danny" Meyer ("Meyer") is the founder and CEO of USHG and~~
~~27 the founder of the fast-casual chain Shake Shack. He is listed as No. 1 on Nation's Restaurant~~
~~28~~

~~News' 2016 "Power List," described as "the most definitive list of industry leaders who are not only setting trends today, but also shaping them for tomorrow." Shake Shack, which operates at least seven restaurants in California, does not allow its employees to receive tips, i.e., they have no tip jar.~~

~~24. Defendant Sabato Sagaria ("Sagaria") was USHG's chief restaurant officer until approximately the fall of 2017.~~

~~25. Defendant Crafted Hospitality, LLC is a limited liability company organized under the laws of the State of Delaware. It owns four restaurants in New York City, including Craft located at 43 East 19th St., and also owns and operates Craft Los Angeles, located at 10100 Constellation Blvd., two restaurants in Nevada, and one in Miami.~~

~~26. Defendant Thomas Colicchio ("Colicchio") is the founder, co-owner, and managing~~

~~member of Crafted Hospitality. Upon information and belief, Colicchio regularly visits California in connection with his restaurant businesses.~~

~~27. Defendant Momofuku 232 Eighth Avenue, LLC ("Momofuku 232") is a limited liability company organized under the laws of the State of New York. It owns and/or manages Nishi restaurant, located at 232 Eighth Avenue in New York City. It is a subsidiary of Defendant Momo, *irifra*.~~

~~28. Defendant Momo Holdings, LLC ("Momo") is organized under the laws of the State of New York with its headquarters at 853 Broadway in New York City. Momo owns directly or through subsidiaries approximately fifteen restaurants located in New York City, Washington, D.C., Las Vegas, Sydney, Toronto, and Los Angeles.~~

~~29. Defendant David Chang ("Chang") is the chef, founder, and chief executive officer of Moma. He lived in California from approximately October 2017 until January 2018 to~~

1 facilitate the opening of Majordomo, a restaurant located at 1725 Naud Street in Los Angeles,
2 which opened in January 2018.

3 30. Defendant Marlow, Inc. ("Marlow") is a limited liability company organized under the
4 laws of the State of New York, with its principal place of business at 85 Broadway in
5 Brooklyn. It owns five restaurants in Brooklyn: Diner, Reynard, The Ides, Roman's, and
6 Achilles Heel.
7

8 31. Defendant Andrew Tarlow ("Tarlow"), is the founder and CEO of Marlow.

9 32. Defendant Happy Cooking Hospitality, Inc., ("Happy Cooking") is a limited liability
10 company organized under the laws of the State of New York, with its principal place of
11 business at 96 Grove Street in New York City. It owns five restaurants in Manhattan: Fedora,
12 Perla Cafe, Bar Sardine, Jeffrey's Grocery, and Joseph Leonard.
13

14 33. Defendant Gabriel Stulman ("Stulman") is the founder and CEO of Happy Cooking
15 Hospitality.

16 34. Defendant Molinero, LLC, dba Huertas is a limited liability company organized under
17 the laws of the State of New York, with its principal place of business at 101 pt Avenue in
18 New York City.
19

20 35. Defendant Jonah Miller ("Miller") is the executive chef, co-owner and a managing
21 member of Huertas.

22 36. Defendant Nate Adler ("Adler") is a co-owner and a managing member of Huertas.
23

24 37. Defendant Bilih of the Cool, LLC, dba Eleven Madison Park is a limited liability
25

26 company organized under the laws of the State of New York, with its principal place of
27 business at 11 Madison Avenue in New York City. Eleven Madison Park was owned by
28 Defendant Union Square Hospitality Group until 2011 when it was sold to Humm and

~~Guidara. Eleven Madison Park is affiliated with Make it Nice, LLC (a New York LLC), Make it Nice Hospitality, LLC (a New York LLC), Make it Nice Hospitality II, LLC (a New York LLC). Upon information and belief, one or more of the Make it Nice entities owns, directly or indirectly, Eleven Madison Park, NoMad restaurant in New York City, and the NoMad restaurants in Los Angeles, which opened in January 2018.~~

~~38. Defendant Make it Nice, LLC ("Malce it Nice") is a limited liability company organized under the laws of New York. Upon information and belief, Make it Nice owns Birth of the Cool, LLC dba Eleven Madison Park, as well as the NoMad New York and NoMad Los Angeles restaurants.~~

~~39. Defendant Daniel Humm ("Humm") is an owner and managing member of Birth of the Cool and Make it Nice. Humm began working at Eleven Madison Park in or around 2006, and is a protege of Meyer. Upon information and belief, Humm spent substantial time in Los Angeles in 2017 and early 2018 in connection with the opening of NoMad Los Angeles.~~

~~40. Defendant Will Guidara ("Guidara") is an owner and managing member of Birth of the Cool and Make it Nice. Guidara began working at Eleven Madison Park in or around 2006, and is a protege of Meyer. Upon information and belief, Guidara spent substantial time in Los Angeles in 2017 and early 2018 in connection with the opening of NoMad Los Angeles.~~

~~41. Defendant New York City Hospitality Alliance, Inc. (the "Alliance") is a limited liability company organized under the laws of the State of New York, with its principal place of business at 65 West 55th Street, Suite 203A, New York City. It was founded in 2012 and, upon information and belief, has over 600 due-paying members.~~

42. ~~Defendant Andrew Rigie ("Rigie") is the executive director of the New York City~~
+
~~Hospitality Alliance.~~
2

III.

~~23~~24

~~ADDITIONAL~~ CO-CONSPIRATORS

25

23. Numerous individuals and businesses in the Bay Area and elsewhere, not named herein,
43. have actively and knowingly

6

26

facilitated and assisted in the formation and operation of the conspiracy.

27

28

24. Upon information and belief, over 30 restaurants in the Bay Area and over 300 restaurants nationally have eliminated tipping and increased prices by agreement with competitors. Upon information and belief, in New York City over 40 restaurants have eliminated tipping and increased prices pursuant to concerted agreement. Upon information and belief, over 20 restaurants in the Los Angeles area, over 10 restaurants in Chicago, over six restaurants in the Twin Cities, over six restaurants in Portland, Oregon, and over 20 restaurants in Seattle have eliminated tipping and increased prices pursuant to concerted action. Specific allegations regarding concerted agreement by, and the participation of, such restaurants to fix prices, may yet be filed in this or another court with personal jurisdiction over them.

Further amendment

24.25. s amendments may be sought to add additional named defendants and allegations as appropriate.

IV. 11

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over the alleged Sherman Act claim pursuant to the

Clayton Act, 15 U.S.C. § 15, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found

or has an agent ..., "...," and pursuant to 28 U.S.C. § 1331, which provides that "the district courts shall have

original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the

United States."

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This Court has subject matter jurisdiction over the California and New York state law claims pursuant to 28 U.S.C. § 1367(a), which provides that district courts shall have
supplemental
jurisdiction over all other claims that are so related to claims in the action within
such original
jurisdiction that they form part of the same case or controversy.
28. Venue lies in this court Court pursuant to 28 U.S.C. § 1391(b)(2), which provides that a civil
action may be brought in "a judicial district in which a substantial part of the events or
omissions given rise to the claim occurred ...".

47. ~~Upon information and belief, the court~~ 29. The Court has ~~general~~ personal jurisdiction over the

+

25

2 ~~following~~ defendants ~~who because they all~~ reside in

~~and~~/or do substantial business in the State of California: a)

2526

3 ~~Vogler~~ (resides in California), b)

140 NM LLC (organized under the laws of California), c)

2627

4 ~~Bar Agricole, LLC~~ (organized under

the laws of California), d) Hopemoorelain, LLC

5

28

(organized under the laws of California), e)

Moore (resides in California), f) Hopelain (resides

in California), g) ES Verdad, LLC

(organized under the laws of California), h) Paluska

~~8~~ (resides in California), and i) Hoffman

(resides in California), ~~j) Mamo Holdings, LLC (owns and)~~

~~9 operates California restaurant), k) David Chang (lived in California for part of 2017 and 2018~~

~~10 in connection with opening of new restaurant), l) Humm (believed to have spent substantial~~

~~11 time in Los Angeles in 2017 and early 2018 in connection with the opening of Nomad~~

~~12 restaurant in which he is believed to have an ownership interest), rn) Guidara (believed to~~

~~13 have spent substantial time in Los Angeles in 2017 and early 2018 in connection with the~~

~~14 opening of Nomad restaurant in which he is believed to have an ownership interest), n) Make~~

~~15 it Nice, LLC (believed to be owner of Nomad Los Angeles restaurants), o) Craft Hospitality,~~

~~16 Inc., (owns and operates California restaurant), and p) Colicchio (ownership interest in~~

~~17 California restaurant; believed to regularly travel to California on business).²~~

~~20 48. Upon information and belief, the Court has general and/or specific personal~~

~~21 jurisdiction over a) USHG, b) Meyer, c) Sagaria, d) Marlow, and e) Tarlow, as such persons~~

~~22 have had sufficient contacts with the State of California related to or arising out of the alleged~~

~~23 claims such that this Court may exercise jurisdiction over them consistent with the Due~~

~~24 Process Clause of the Fourteenth Amendment of the United States Constitution.~~

~~26~~
~~27~~ ²Colicchio also is the head judge on Top Chef, which was filmed in California in Season 1-
~~28~~ (2006, San Francisco), Season 2 (2007, Los Angeles) and Season 13 (2016, San Francisco, Los
 Angeles, San Diego, Santa Barbara, Oakland, and Palm Springs).

1 a. USHG personnel have traveled throughout the country promoting

2 hospitality included and upon information and belief, California was the

3 destination
4 for
5 some
6 such
7 travel
8 s. 3

9 V. STANDING

10 30. In 2015, USHG made a "significant

11 minority investment" in Tender Greens, a California-based "fine-casual"

12 restaurant chain with over twenty locations in California and one in New

13 York City. USHG has also invested in the ice cream chain Salt & Straw,

14 which has multiple California locations. USHG also is believed to own a

15 significant stake in Shake Shack, which also has multiple California

16 locations. USHG also runs a consulting business called "Hospitality

17 Quotient" that offers "competitive analysis" services to businesses

18 throughout the United States. Upon information and belief, Hospitality

19 Quotient has provided consulting services to businesses in California.

20 Also, the contacts of Meyer and Sagaria on behalf of USHG, described

21 below, are attributable to USHG.

22 b. Meyer is believed to travel to California regularly on business, including

23 in connection with USHG's investments in Tender Greens and Salt &

24 Straw, and in connection with the opening of Shake Shacks in California.

25 Meyer has communicated with at least one California defendant regarding

26 the elimination of tipping (see Par. 88). Upon information and belief,

27 Meyer had additional such communications.

28 c. Sagaria traveled to the Bay Area in July 2015 and in April 2016 to attend

conferences and discuss hospitality included with California restaurant

owners. See Par. 77, 128.

d. Marlow and its owner Tarlow developed an open-source "gratuity-free" logo which is, upon information and belief, used in restaurants throughout the United States and in California to market the elimination of tipping,

49. Upon information and belief, this Court has personal jurisdiction over all defendants,

including over defendants Momofuku 232, Happy Cooking, Stulman, Molinaro, Miller, Adler, the Alliance, and Rigie, by way of the purposeful direction of their intentional acts at the State of California with knowledge that the harmful effect of their acts was likely to injure California residents.⁴ Upon information and belief, such defendants were aware that: a) they

were participating in the same conspiracy as the California defendants, b) California

defendants provided information and support to New York defendants for the purpose and

with the effect of furthering the conspiracy in New York, c) New York defendants provided

information and support to California defendants for the purpose and effect of furthering the

conspiracy in California, and d) California residents who 2017, Brown purchased food and drinks from the

defendant restaurants were overcharged on said purchases and hence were damaged and

injured as a result of the conspiracy.

50. Information regarding contacts of and by the New York defendants with the State of

California is primarily in the possession of the New York defendants. None of the corporate

defendants are publicly held, making pre-filing access to even a modicum of such information

difficult. Discovery will be sought as needed to determine the specific nature and extent of

⁴ See *Calder v. Jones*, 465 U.S. 783 (1984). Under the Ninth Circuit's interpretation of *Calder*, jurisdiction is established under the so-called "effects" test" if (1) the defendant has committed an intentional act, which is (2) expressly aimed at the forum state, and (3) causes harm which is suffered and which the defendant knows is likely to be suffered in the forum state. See *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

~~the New York defendants' contacts with the State of California, both generally and as~~
~~specifically concern and relate to the charged conspiracy.~~⁵

~~V. STANDING~~

~~51. In April 2017, Brown purchased and~~ consumed food from Reynard at 80 Wythe
 Avenue in Brooklyn, New York, and at Gramercy Tavern at 42 East 20th Street in Manhattan.

~~8~~ The Reynard menu said that ~~"Reynard is a gratuity-free restaurant. Everything is~~
~~included in~~

~~9~~ your bill. There is no need to tip."~~"~~ The tip line was removed from the Reynard
 receipt. The

~~server at Reynard told Brown that the price of the fried chicken sandwich he ordered~~

~~increased~~

~~from \$16 to \$21 after tips were eliminated, a 31 percent increase before taxes.~~

~~52.~~ ¹⁰ ~~31.~~ Gramercy Tavern provided to Brown a ~~"rate your experience"~~ postcard
 that said ~~"~~

~~"Please note that our prices are now all-inclusive; there is no need to tip at the end of your~~
~~meal. We believe that this change is the best way to take care of our people, who are the heart~~
~~of this restaurant." Brown's meal at Gramercy (Strozzapreti) cost \$21.78 including tax.~~
~~The~~

~~of this restaurant." The server at~~
~~receipt said "Gramercy Tavern is a non-tipping restaurant. Hospitality Included." The server at~~
~~Gramercy told Brown that a number of servers quit as~~

~~a result of the implementation of~~
~~hospitality included.~~

~~53.~~ ¹⁶ ~~32.~~ On June 26, 2017, Brown purchased and consumed food from Comal in
 Berkeley and

~~Camino in Oakland,~~ owned and operated by defendants in this action. The tip line was

removed from both the Camino and Conal receipts. Conal added a 20% service charge in

lieu of a tip⁵ to the bill. The Camino purchase, with service included, was for \$10.93. The

⁵ See, e.g., *Laub v. US. Department of Interior*, 342 F.2d 1080, 1093 (9th Cir. 2003) (jurisdiction discovery should be allowed if there is a reasonable probability that jurisdiction may be established); *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977) (holding that district court abused its discretion in refusing to grant discovery on jurisdictional issue).

33. Brown generally tips in an amount tied to the quality of his dining experience, sometimes at 20%, but often less, and occasionally more. But the amount Brown generally tips, or would have tipped at any restaurant no longer accepting tips, is not legally relevant either to calculation of damages or to standing. Damages arising from a *per se* price-fixing conspiracy are not determined or reduced by what an affected customer might have voluntarily paid, but rather by the full amount resulting from the illicit agreement to raise prices in concert.

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By virtue of ~~79~~

54. — ~~Brown his Camino and Comal restaurant purchases, Brown~~ establishes standing with

respect to all defendants ~~following, including those from whom he did not make any purchases at some.~~²

~~of the participating restaurants, without the need for purchases at all such restaurants.~~⁶

The charged conspiracy is ongoing and increasing in ~~geographic~~ scope. Absent ~~34.~~⁴ appropriate

injunctive relief, it is likely and probable that Brown ~~and, as well as~~ putative class members

~~comprised of local and visiting diners who will be subject to higher restaurant prices in lieu of~~

~~voluntary tipping.~~ will incur additional overcharge damages in the future.

~~56.~~

VI. On July 9, 2013, Danny Meyer tweeted: "Considered eliminating tipping years ago,

and then servers asked to keep things as they were. Your opinion please." Tom Colicchio responded: "@dmeyer I'm thinking the same for craft." David Chang responded: "@tomecolicchio @dmeyer we are more than kicking around the idea at @momofuku of figuring out how to increase prices removing tips w/o revolt."

57. The Bay Area defendants had

Direct Evidence of Formation of a Price-Fixing Conspiracy

35. Defendants reached an agreement to raise prices that was confirmed in

writing. In or around mid-September 2014, Paluska indicated in an email that Camino,

Comal, Duende, Bar Agricole and Trou Normand and their owners had among and between

and among themselves "agreed to the following basic parameters: 1. Minimum 20% service charge 2. No

tip line 3. Commitment to change to a service charge by (a certain date TBD) 4. That theraise prices and

eliminate tipping which was memorialized in a September 21, 2014 email from defendant

Paluska to 16 persons including defendant Vogler, defendant Moore, and Paul Canales, owner

of Oakland restaurant Duende. Defendant Hoffman was copied on the email. The email states:

Hello all

Since there's a good-sized group of us turning out for the 11am meeting at Camino tomorrow (Monday), and several others engaged in this process who can't make it, we're sending out an email in advance to get everyone on the same page heading into the meeting.

Some of you have already seen the email we sent to a couple folks in recent days, but we're sending it along again as it summarizes what a small group of us have been able to agree on thus far:

We are moving forward fairly quickly with a group of other restaurant owners who are of similar mind regarding moving to a service charge be used for employee wages, benefits, and payroll expenses"model. This

group includes Russ and Allison (Camino), Thad Vogler (Bar Agricole and Trou Normand), Paul Canales (Duende) and us. While we are leaving some

the particulars to each restaurant owner, we have agreed to the following basis

parameters:

1. Minimum 20% service charge

2. No tip line

² See, e.g., *Bogosian v. Gulf Oil Corp.*, 561 F2d 434, 448 (3rd Cir. 1977) (the “fact that a customer has not made purchases from every co-conspirator does not prevent him from suing all— for each co-conspirator contributed to the charging of the supracompetitive price paid by the purchaser.”).”)

58. ~~A meeting was held at Camino on September 22, 2014, with a "good-sized group" Commitment to~~

~~2.3.2 discuss the no-tipping/added change to a service charge policy. Paluska sent an email to sixteen people only (a certain date TBD)~~

~~September 21, 2014, which stated in part:~~

~~4. That the service charge be used for employee wages, benefits, and payroll expenses~~

Our current plan is to announce as a group with a press release in mid-October,

with the idea of implementing the new service charge model within a few weeks

from the announcement, likely between Dec 1 and Jan 1. ~~We'd~~ We'd like to keep the

overall group that is linked to the announcement fairly small so that we can

coordinate and be as consistent with our messaging and implementation as

possible.

We all feel very strongly about the four points listed above. While we have accepted that not all FOH employees will be making as much compensation with this new model as they have been making with the current paradigm, our goal is

~~this new model as they have been making with the current paradigm, our goal is~~

to keep as much consistency with FOH as possible while simultaneously raising up the BOH compensation. The only way to do this is to charge at least a 20%

surcharge. SF restaurants have the added challenge of how to deal with the

Healthy SF factor, which leads us to assume that 20% ~~isn't~~ isn't a hard sell for any SF operator on the list.

~~operator on the list.~~

Another reason for the 20% minimum is that we want to do our best to shift the

13

26

27

28

2 in poor taste to charge a 20% service charge and simultaneously leave a
tip line on the credit card bill. If a customer is moved to leave cash in addition to
the 20%
service charge, that's fine, but we will be sending a clear message on our menus,
websites, etc that no further gratuities are expected. We want to put the customer
at ease, and remove any ambiguities about what is expected.

...

[O]ur preference is to announce as a group in mid-October, with the goal of

3 implementing the new system by the first of next year if not sooner. This
is

probably too fast for some of you who more recently joining the conversation,

and we are looking forward to getting a better sense of ~~everyone's~~ everyone's
timing and outlook

~~outlook~~ when we meet tomorrow. ... ~~[I]t's Berkeley's minimum wage jumps again on~~
~~Oct 1 and~~
~~will continue increasing. Oakland is poised to vote for a ballot measure that will~~
~~result in a jump to \$12.25 in March 2015. So we feel some sense of urgency now.~~
~~That being said,~~ it's exciting to see how many great

operators are suddenly part of the discussion, and it goes without saying that it

9 will be a very powerful
statement if all of us could announce a new direction together.

~~together.~~

25 While we feel that it's important to announce as a group, we're leaving it
somewhat flexible as to when various operators actually implement the new
system. That being said, we don't see a lot of positives to announcing the shift
and then waiting more than 6-8 weeks. That time frame provides enough time to
gauge which [Front of House] employees are going to move on (hopefully not

1 many) and is also a respectful notice period to give them so they don't feel they
2 are being ambushed by the new system. And obviously it will be critical to
3 properly announce this decision to staff before anything formal goes public.

4 Other topics of discussion:

5 * does it make sense for there to be a spokesperson for the group? (we

6 think probably not ~~...)~~...)

7 *

8 5

9 * should the group be formally organized or kept loose?

10 * should everyone in the "group" be committed to making the change at
11 all of their establishments? ~~(emphasis in original)~~

12 * what are the key talking points we want to put out for the press as to

13 why we are making this change? ~~... We~~ It may be obvious to us, but we need
14 to figure out
15 a succinct positive message that we all consistently reference with the media. We want
16 to present this as an exciting,

17 potentially transformative

18 moment in the restaurant business... We don't want to appear reactive or

19 negative.

20 * are there any other common points of agreement that could be added to
21 the list above? does the list above need to be modified in any way?

22 * talking points / protocol for staff when addressing customer complaints,
23 questions, etc after the change

24 * should we hire a PR firm to control the message and handle inquiries?

25 * various models being discussed — switch to hourly pay for all
26 employees? A hybrid of hourly pay plus a bonus pool (more closely related
27 to current tip

19 pool paradigms)? If choosing the hourly/bonus pool hybrid, which positions
20 are part of the pool? Sliding scale hourly pay based on merit within each
21 position?

21

22

...

CONFIDENTIALITY — please do not forward this email or share

4

23

information about this meeting with media or hourly staff ~~—it's—~~ it's a
sensitive issue and we

24

want to preserve the ability to handle it with care both internally and
externally.

5

25

So much more to talk about but this is already a very long email. See some of

7

26

~~8—~~ you tomorrow and looking forward to keeping the discussion going with
all of

9

you. We expect the meeting to last 60-90 minutes, We'd like to keep it big picture as
there will be plenty of

27

~~10—~~ opportunities to explore specific issues in ~~smaller groups.~~

44

12

28

~~13~~ smaller groups.

1 We'd like to get a final head count for the meeting tomorrow, so please RSVP
2 if you can.

John and Andrew (Comal)

3 Russ and Allison
4 (Camino)

5 (Emphasis in Original)

6 36. The above-referenced meeting was held as scheduled at Camino on September 22,
7 2014.

8 Media Reports on the Existence of the Conspiracy

9 37. The conspirators reached out to the media to report on their agreement. On October 24,
10 2014, the *San Francisco Chronicle* reported on the agreement

11 between the Bay Area among defendants to increase prices and eliminate tipping:

12 11

Citing both pragmatic and philosophical reasons, a small collection of Bay Area

13 restaurateurs is eliminating tipping. Instead of expecting diners to leave a tip, the

14 restaurants will automatically add a 20 percent service charge to all bills — and not

15 accept any additional gratuity beyond the service charge. The five businesses -
16 Comal in Berkeley, Camino and Duende in Oakland, and Bar Agricole and Trou
17 Normand in

18 San Francisco — each plan to institute the policy within the next few
19 weeks, forsaking the ubiquitous model they believe is outdated. And they expect more

20 restaurants could

21 follow suit. "If we were doing this, and there was a sense that the rest

16 _____ of the world ~~wouldn't~~

17 ~~wouldn't~~ pay much mind to it, I would be more concerned. But this is on
 18 ~~everybody's~~ everybody's minds," said Comal partner John Paluska.

19

38. On October 24, 2014, the *San Francisco Eater* also reported on ~~the~~ this
 agreement:

20

[A] new band of top-notch (but not high-end) restaurants have decided to
 make another run at the no-tipping policy, hoping their collective power
 will have an impact. Over

21

the next few weeks, sister spots Bar Agricole and Trou Normand, along
 with an ~~W~~ unaffiliated trio of East Bay restaurants, Camino,
 Comal, and Duende, are kissing

22

tipping goodbye. In its place: an automatic 20% gratuity. The restaurateurs
 say this

23

move is intended to get out ahead of the minimum-wage increases that
 will likely pass in both SF and Oakland, for both ideological and
 economic reasons. ~~"Why"~~ "Why" rely on

24

legislation to do the right thing? ~~"?"~~ Thad Vogler, owner of Bar Agricole and
 Trou

25

Normand, told the *Chron*.

26 Vogler Admits Existence of Conspiracy

39. On October 27, 2014, during a KQED radio show, defendant Vogler
 confirmed that the

1 **Michael Crasney** [Host]: Let me begin Thad Vogler with you and I said this is largely
2 I suppose as a catalyst for you doing this the minimum wage change and discrepancies

22 ... in pay between the front, those who are serving and busing, and so forth, and the
23
24 back, those who are cooking and dishwashing.
25

3
4 **Vogler:** Yea, I think ~~that's~~that's accurate. There has been talk of a fifteen dollar minimum
28 wage in San Francisco. It seems sort of inevitable. I was surprised to see that I had a gut

~~gut~~ reaction to that of oh no as a small business owner, and as ~~I've~~I've sat with that it

seems crazy that anyone would hesitate to guarantee a fifteen dollar minimum wage in
San

Francisco. I mean even fifteen dollars is not sufficient to exist here. So I just

realized it would be silly to wait for legal reasons to do that and *we as a group decided*
to commit
to that now. (emphasis added.)

...

Crasney: But why move toward this? What is the big positive in this?

Vogler: A number of reasons. One, there has long been a, ~~it's~~it's been unfortunate that
the kitchen is excluded from this portion of revenue so a kitchen employee on a

Monday

we do one hundred people makes the same as on a Saturday where you do

two hundred

and fifty people. The kitchen is excluded from the excitement of selling more, the
profitability of selling more, the financial benefit of selling more. It just seems, it
longed seemed to a lot of us unfair to exclude systematically a big part of

your house from that reservoir of money. We ~~don't~~don't want to exclude the front of the

house from that

incentive. We just want to broaden the incentive to allow kitchen

employees to benefit.

Another thing is that you know restaurants ~~....~~.... I mean part of the charm is they have
long been sort of lawless institutions with two sets of books and there is a lot of
grey

market economy with the restaurants and as a small business

owner you ~~don't~~don't really want to be a part of it. ~~There's~~There's a whole lot of tax
~~that's~~that's not

getting paid on the tip pool

by tipped employees and also by business owners that are

~~25~~ avoiding paying payroll tax

by not accounting for all the gratuity ~~that's~~that's received....

As a business owner, it is sort of nice to clean up your books in that way and do

everything above board and fully
transparently.

21
(Emphasis Supplied)

22
23 40. Gwyneth Borden, executive director of the Golden Gate Restaurant Association

24 2 (“GORA”), (“GGRA”), a trade association of over 600 Bay Area restaurants,
participated in the same radio show from New York City, where she was attending the
Ninth Annual International Chef’s

25 ~~Chefs~~ 3 Conference. One of the presentations was “Should America Ban Tipping?”². Upon

5 information

26 and belief, ~~one~~ panelist ~~said~~ commented that one problem with ending tipping and increasing
6 prices is

27 that price-sensitive customers will look at the higher menu prices and go elsewhere.
7

8 He also

28

said that restaurants have an "uphill battle" going it alone and that "it's 'it's" up to restaurateurs and

upscale restaurants with customers who aren't aren't price sensitive to lead the charge.""

41. A server on the show said eliminating tips could reduce his income by 40-50 percent.

He also said - "The people in the kitchen should be paid. If ~~they're~~ they're not paying the fifteen

dollars per hour now ... I mean the only way they are going to get a decent wage in the

15 kitchen

is being forced I guess by minimum wage.""

Conspirators Address Concerns and Staying the Course

42. On October 27, 2014, defendant Paluska sent an email to the Bay Area other defendants and to Duende

which said stated:

Maybe we should all get together by phone or in person to check in? We've

We've received a handful of emails and calls from customers claiming that they won't

won't be

coming to Comal any more, but it's been pretty minimal.

I have to say, what's what's really starting to look attractive is no service charge and no tipping = just an all in pricing structure = maybe if a bunch of places jump in on the service charge approach, maybe there will be a window where restaurants

could consider making such a move.

43. On October 27, 2014, Jay Porter, owner of The Half Orange restaurant in Oakland,

emailed a "word of encouragement" to defendants Hoffman and Paluska:

I see that the local media has, in the last week, discovered out that stories about tipping — even if the stories are shoddy, inaccurate, etc. — encourage vitriolic comments, which in turns drives [a lot] of clicks, making them a lot of money.

I went through this too, and it sucks, but I came to observe that the kinds of

people who write inflammatory comments, bitch on Facebook, or call in to radio shows are not really the kind of people that go to thoughtful, good restaurants anyway.

~~Don't~~²¹

Don't let ~~you~~^{it} get ~~it~~^{you} down....

23

A Conspirator Expresses Concern that Another Non-Tipping Restaurant has Not Increased Prices Sufficient to Sustain the Conspiracy

25

44. On or about November 3, 2014, defendant Paluska became concerned that another

26
Berkeley

restaurant had eliminated tipping but ~~only~~ imposed only a 10% surcharge. In fact, the

restaurant added an 18% surcharge. Defendant Paluska sent an email to defendant Hopelain —"

“Allison — not sure

where you got the idea that they are doing 16%, but it looks like they are doing 18% - phew.”

Recruitment Efforts to Enlarge Conspiracy

On November 19, 2014, Hopelain indicated that the group should reach out to as many restaurants as possible and “tell people what we are doing and encourage/rally them to

do it,

too.”

46. On December 4, 2014, Hopelain sent an email to other defendants, informing them that

“we are trying to set up a meeting for next week with other Oakland restaurants to explain what

we are going to do. And hopefully rally them to do the same. I know a lot of people are trying

to figure it out.”

Conspirators Retain Public Relation Experts to Spin Their Agreement as Beneficial to All

47. Restaurant and hospitality consultant Andrew Freeman of AF&CO was retained to

assist the Bay Area restaurants in messaging and public relations with respect to the change to a no-tipping model. At the time, AF&Co. was partnered with The Hall Company, a global

13 public relations firm specializing in the hospitality industry with offices in New ~~York~~York, Los
+
2 Angeles, and Tokyo.

3 48. The Bay Area restaurants at issue also retained restaurant consultant Joyce Goldstein to

4 to help with public relations. She drafted an editorial supporting the no-tipping movement,

5
16 which

17 stated in part:

18 Many diners and waiters have criticized replacing tipping with a service charge.

8 They want to hold onto the system they know. But in this financial environment,

19 change is inevitable because it is the right thing to do for the most
people and

20 California should again lead the way.

21 ...
22 Tipping in restaurants is an arcane system that gives diners the illusion that they
23 have power to influence service and it gives waiters the illusion that their actions
alone comprise restaurant service and determines the tip.

24 ...
25 The Bay Area is a really expensive place to live. Line cooks (like firemen and

26 public school teachers) cannot afford to live here on what they earn.... To
27 survive, many of them share a one bedroom apartment with three other cooks.
28 Our chefs train them and soon they leave for a more affordable city or to stay,

they work two jobs and are burnt to a crisp. Given this financial environment

~~23~~

~~1~~

there is a huge shortage of line cooks in the Bay Area.

~~24~~

~~25~~

~~26~~

~~27~~

~~28~~

...

Change is inevitable when it will do the most good for the most people. The Bay

area should lead the way in making the restaurant industry a more equitable place to work.

Conspirators Effectuate Their Agreement to Increase Prices and Eliminate Tipping

49. In late 2014, pursuant to their agreement, the defendants eliminated tipping from their restaurants, and either a generally applicable service charge was eliminated and added or menu item prices

were raised/increased at Bay Area restaurants Trou Normand, Bar Agricole, Camino, and Comal.

Although Duende agreed to

increase prices, it was a party to the agreement, its owner subsequently decided not to do so before roll-out backed out and did not

Comal's raise prices through a surcharge or otherwise.³

A Conspirator Discusses Whether Prices Should Be Increased Through Surcharge or Higher Menu Prices

50. Comal's website said: "'We believe in what Danny Meyer calls 'enlightened' enlightened hospitality'

that providing good service is its own reward. We want our staff to provide the best possible

service, but we want the motivation to provide this great service to come not

from the hope of a

big tip but rather from pride in a job well done.'" In the Q and A:

Question: Why don't you just incorporate the cost of service into the menu pricing and

and eliminate the service charge?

Answer: We considered doing so, and still hope to do so sooner than later. But it's a

difficult thing to do in a competitive marketplace where the vast majority of restaurants

~~restaurants~~ price their menus based on the assumption that their service staff will make a

~~a~~ significant portion of their compensation from tips. As more restaurants move to a service charge in lieu of tip (which we believe will happen in the coming months and

years), the circumstances will be more favorable to taking this additional step.

~~72. On December 4, 2014, Hopelain said that "we are trying to set up a meeting for next~~

~~week~~ Conspirators Share Their Know-How with ~~other Oakland restaurants to explain what we are going to do. And hopefully, rally~~

~~them to do the same. I know a lot of people are trying to figure it out."~~

73. On **January 12, 2015**, a class action lawsuit was filed against Colicchio alleging that

employees at his Wichcraft chain were unlawfully docked tips, denied overtime, paid below minimum wage, Industry and sexually harassed. Colicchio has reportedly said Learn from Their Peers in New York laws

requiring that workers receive written notice of a wage change is a "technicality" and that "it's absolutely wrong" to penalize employers who violate such laws.

74. In or about **January 2015**, the NYC Hospitality Alliance released the results of a

survey showing that New York City servers earn on average \$25.34 per hour including tips, and bartenders earn on average \$27.48 per hour including tips.

75. On **February 2, 2015**, the Alliance sponsored an industry conference titled "Have We

Reached the Tipping Point for Tips?" One panelist said that restaurants would not pay servers twenty-five dollars per hour if tipping was eliminated. Rigie said -- "One of the most interesting things that I grapple with, and I know many of you in this room we've had these discussions. What is it going to take the industry to change ... One of the big things that is holding people back ... they don't want to be the test case where we get rid of tipping ... our tipped employees will get a straight hourly wage which will reduce their hourly rate and then they are going to work across the street at my competitor. And that just really seems to be the big challenge and I don't know if there is really any one way that enough restaurateurs at one time are going to make a switch and say we're going to move from tipping ..."

76. On or about **February 8, 2015**, Colicchio told Crain's New York Business that it would be easier to eliminate tipping "if a Jimmy Haber, Danny Meyer, or Daniel Boulud did it ... I expect that ten years from now, no one will know what a tip is."

77. ²⁴ York City and Elsewhere

²⁵ 51. On July 26-27, 2015, GGRA held its first annual industry conference. Vogler and Defendants

²⁶ Vogler and Hopelain were featured panelists for the "The Tipping Point: Rising Labor Costs and

³ A twenty percent surcharge (or twenty percent increase in menu prices) increases total cost by more than twenty percent when tax is taken into account. Tax is not paid on tips.

and the New Restaurant" session. ~~Sagara~~ A representative of USHG attended "our
"the Tipping Point

panel and connected with Thad

Vogler, owner of Bar Agricole and Trou Normand to talk about Thad's

Thad's new then [sic] tipless

model, which helped inspire[] some of [the] mechanics of USHG's

USHG's tipless policy." One

questioner asked "what can all of us do and what can the Golden

Gate Restaurant Association

do to make this an easier step for all the rest of us to go in that
direction ... it would be nice to

have some sort of game plan that would level the playing field
and make us all go in with one

voice and with one kind of unity so that servers do not cannot [sic] really say that I don't
want

to [sic] really say that I don't want to work here anymore because I can still go to the
other place

that still has the old system so

to speak. If everybody's everybody's doing the same thing, we alleviate that

point." In response, GGRA

Executive Director Borden, the panel moderator, said that

"obviously as a trade association ;

we cannot do price fixing ..."

7852. On September 1, 2015, a group of restaurant owners in Los Angeles were sued for

price fixing in

connection with their implementation in 2014 of a three-percent surcharge on

all sales. One of this group reportedly said he was "inspired by the Northern California

pioneers" and that he

13 emailed a group of "like-minded restaurant owners" to see whether they

14 could "plan a course

15 of action together." Another of the Los Angeles conspirators was reported saying that "we

16 decided it would be a good thing to do as a group. ... Usually when lots of people do things

17 it's-it's easier to make change." The case was tentatively certified as a class action in January 2018.

18 class action in January 2018.

19 79. The Wall Street Journal reported that around **August or September 2015**, Meyer

20 gathered together fifteen of New York's top restaurateurs, representing about eighty

21 establishments, to tell them that USHG was planning to end tipping and raise prices. The

22 apparent purpose of the meeting was to solicit participation by the attendees and, upon

information and belief, other participants indicated they would follow USHG's lead. Upon information and belief, Meyer, in response to questions about the Los Angeles lawsuit referenced in Par. 78, above, said that "the first rule of this meeting is that this is the only meeting we're ever going to have as a group."

80. On or about September 15, 2015, Colicchio said that Craft's new lunch service would be gratuity free with higher prices. "It's time for a change, it's time to pay servers a salary ... Waitstaff should no longer be beholden to someone who might not like the way they look." Upon information and belief, Colicchio attended the meeting referenced in Par. 79 above.

81. On October 14, 2015, Meyer announced that USHG would eliminate tipping and increase prices at all of its New York City restaurants by the end of 2016:

Dear Friends,

I am writing to share some important news about Union Square Hospitality Group that we want you to understand before your next visit to one of our restaurants.

Recently, our entire company has been engaged in a robust conversation about how we can provide even more meaningful career opportunities and advancement for our 1,800 employees. It has become increasingly clear to us that a major obstacle in this endeavor is the practice of tipping.

There are countless laws and regulations that determine which positions in a restaurant may, and may not share in gratuities. We believe hospitality is a team sport, and that it takes an entire team to provide you with the

1 experiences you have come to expect from us. Unfortunately, many of our
2 colleagues — our cooks, reservationists, and dishwashers to name a few —
3 aren't able to share in our guests' generosity, even though their contributions
4 are just as vital to the outcome of your experience at one of our restaurants.

5
6
7 After a thoughtful, company-wide dialogue, I'm proud to let you know that
8 Union Square Hospitality Group will eliminate tipping throughout our family
9 of restaurants. Starting at The Modern in late November, you will no longer
10 find a tip line on your check, and there will be no need to leave additional
11 cash at the table, the coat check, or the bar. Our other New York restaurants
12 will make this change over the course of the next year.

13
14
15 Once these changes are implemented, the total cost you pay to dine with us
16 won't differ much from what you pay now. But for our teams, the change will
17 be significant. We will now have the ability to compensate all of our
18 employees equitably, competitively, and professionally. And by eliminating
19 tipping, our employees who want to grow financially and professionally will
20 be able to earn those opportunities based on the merit of their work.

21
22
23 We are making a bold decision for our team and our guests, and we don't take
24 this lightly. We encourage you to share your thoughts and feedback at
25
26
27
28

~~We remain more committed than ever to our promise of delivering excellent dining experiences with warm hospitality—and we hope that you will both support our team and join us on this journey.~~

~~With gratitude, 17, 2015, Danny Meyer~~

~~82. On or about **October 15, 2015**, Meyer said that the price that consumers will pay~~

~~under the hospitality included model will likely exceed the price that would have been paid before implementation (including tip). According to Meyer "[t]he average person is going to do the math and say I was going to pay A plus B anyway. In our case, it's going to be A plus B plus C, because in addition to the 20% you would've tipped, we're also trying to right what has been a labor of wrong, and that's going to cost a couple more points on top of that." In addition, sales tax is paid on the higher prices but is not paid on tips.~~

~~83. On **October 15, 2015**, Meyer thanked Restaurant Oppmunity Centers United (see Par. 108-12, below) via Twitter: "Thanks go to your education for helping our industry to understand the 'why.' #HospitalityIncluded."~~

~~84. On **October 15, 2015**, Meyer appeared on CBS This Morning:~~

~~**Charlie Rose:** So you call this Hospitality Included. Why are you doing this?~~

~~**Meyer:** You know what? I love the hospitality business as much as anyone on Earth. What I don't love is a situation which is over the thirty year career I've had, the disparity between what somebody can make in the dining room with a tipping system and what somebody can make in the kitchen has widened by about 200 percent.~~

~~**Rose:** A lot more being made by the waiters than the cooks.~~

~~Meyer: Yes. And I love the fact that waiters make good money. As a matter of fact, the waiters at our restaurants when we eliminate tipping will make as much or more in seventy-five percent of the cases than they're making right now. But, when you have a tip, I don't think the general public fully understands where that tip can go and where it's not allowed to go. So for example, when you leave a tip at any restaurant, not only is the waiter generally sharing it with all other waiters, but they're not allowed to share it with anyone in the kitchen. So the very people that cook your food...~~

~~Rose: Why are they not allowed?~~

~~Meyer: Because that's how laws are written across the country.~~

~~Rose: Does it have something to do with taxes or what?~~

~~Meyer: It has nothing to do with taxes. It's that gratuities are only allowed to be shared amongst the people who actually face you during the meal. So that means that on a really really busy Saturday night when everybody's high fiving themselves because they did such a great job taking care of you, the cooks are sweating a little bit more while the waiters are counting a lot more cash.~~

~~Ross: Let me say this. The person I want to be happy is the cook. (Laughter)~~

~~Gayle King: Danny, people say if it is too good to be true, does that mean we're going to pay in other ways. Now the prices of the food are going to be going up?~~

~~Meyer: Well, the price of your meal is exactly what it is. So for example, when you agreed many, many years ago that it was worth paying a little more for organic vegetables or for locally grown vegetables, or animals that were raised responsibly, that got put into the menu prices. And right now it is going to be put into the menu prices not just what we pay the cooks and the florist and the reservationist and for~~

tablecloths but what we ~~pay~~ our servers as well and that's our responsibility to do it.

At the end of the day, when you get your credit card bill a month later, that line when you come to one of our restaurants should look just about exactly as it would have if you had struggled in the dark to put on the tip. So it's true that the menu price itself will look higher to you by about 21 percent, but the total at the bottom will be the same. The benefit is that we will get a chance, because we don't have to worry about who will not get tips, to make it an equitable playing field for everyone.

King: And not worry about people who don't give good tips.

Meyer: That is one of the most demoralizing things in the world if someone stiffes a waiter for slow service and it may not have been the waiter's fault.

Norah O'Donnell: Danny this is on the front *page* of every business section in every major paper in this country because it will revolutionize eating if other restaurants follow your lead. Can you guarantee that it will only be a 20 percent increase in the menu price, or could it go as high as 35 percent as some analysts are suggesting?

Meyer: We'll we're going to start it at 21 percent and try to make it work as best we can. I think it's really important, Norah, to understand that January 1st of next year minimum wage is going to be going up everywhere. And as soon as minimum wage goes up, not just our restaurants but every restaurant is going to have to raise their prices. That doesn't require you to eliminate tipping. But we looked at that moment in time and we said if we're going to have to raise our prices anyway, why don't we use this opportunity to make the restaurant business a much more sustainable place? I just got to add one more thing. We are facing across the whole country the biggest single labor shortage in talented cooking skills that we have ever seen, and part of the reason

1 is that if you're a young kid and you want to go to cooking school with big, big bills,
2 how do you tell your parents what I really want to do is work for eleven dollars an hour,
3 ten dollars an hour, nine dollars an hour, and then live in a big city like New York. So
4 for the very sustainability of the business we think this is important.

5 **O'Donnell:** All right. Really interesting. Thank you restaurant legend. You earned that
6 well. (Laughter)
7

8 **Meyer:** Thank you Queen Gayle. (Laughter)

9 85. **On October 19, 2015, Meyer appeared on Fox's Mornings With Maria:**

10 **Maria Bartiroma:** Restaurateur and Union Square Hospitality Group CEO Danny
11 Meyer taking a stand on wages. In an effort to pay his workers more, he is eliminating
12 tipping from restaurants. He joins us now to talk more about it. Dagan McDowell is also
13 joining the conversation. Danny good to see you. Welcome.
14

15 **Meyer:** Thanks Maria.

16 **Bartiroma:** You have such successful franchises out there and you want to put this
17 across all the restaurants—no tipping?
18

19 **Meyer:** We're going to roll it out over the course of the next year. Well the first thing is
20 that a lot of people don't understand that the tipping system as it is has completely lost
21 any value that it may have ever had. Most restaurants share tips so all the waiters share
22 the tip that you leave so that it doesn't really go to the person you thought it was going
23 to go to, but the law prevents a restaurant from sharing your tip with the people who are
24 cooking your food. So at the end of the day, what's happened is that—it can be a good
25 thing for servers who want to work on commission. It's a bad thing for
26
27
28

1 servers who want to make a profession out of it, but it's a terrible thing if you're the
2 person cooking the food.

3 **Bartiroma:** I couldn't believe that when I read that. Why is it banned that the people
4 cooking the food don't get a piece of that tip?

5 **Meyer:** You tell me. It's a government thing.

6 **Bartiroma:** That is so weird.

7 **Meyer:** It's something that has actually created a disparity where over the past thirty
8 years the kitchen wages have gone up 22 percent on an hourly basis in thirty years
9 whereas in the dining room has gone up well over 250 percent.

10 **Unknown Male:** Danny your strategy, will it help the quality of life of the people
11 working in your restaurant?

12 **Meyer:** It's going to help us to reverse what's been a horrible drought in labor in the
13 kitchen. There is absolutely no incentive to go to culinary school and cook at the level
14 that you need to at one of our restaurants when you know that you just can't make that
15 much money.

16 **Dagan McDowell:** One thing that everybody has said, certainly on Twitter, I've seen
17 so much conversation about this, if I can't reward my server, then the service is going
18 to stink. It's my discretion that I get to say, I get to determine if the service was good
19 or not, what do you say to that.

20 **Meyer:** I say that's my job. I say if you come to one of our restaurants and one of our
21 servers is not offering warm hospitality unless you give him a tip, I don't want that
22 server working for me, and they won't at the end of the day. I would also ask you a
23 question. When you see a menu price in any restaurant, let's say you're going to buy
24

1 the roast chicken, it includes the full price of the roast chicken, including the cook's
2 salary. If the roast chicken is dependent upon you tipping the cook to be good, would
3 you go back to that restaurant?

4 **Bartiroma:** ffs a great point. I mean I just. People might want to do an extra tip on
5 top of, I mean obviously prices will be higher right because you're incorporating the
6 tip in there?
7

8 **Meyer:** The menu price that you see will be higher but the guy that would have tipped
9 is gonna tip anyway so by the time you get your credit card bill it's the exact same
10 thing as if I put it in there in the first place.

11 **Anastasia Amoroso:** Actually when we look at tipping now, unless the service is
12 really, really horrible, you probably still default to an automatic 20 percent. So if that's
13 the case, then that will be passed on to the cooks, to the servers, and so forth. How
14 much of an increase are they looking at in terms of their real wages?
15

16 **Meyer:** Well what we're going to be able to do is to have that discretion ourselves, so
17 by putting the full price into the menu, being transparent about it, it allows us to do
18 two things. Number one is, that we get to determine what everybody's revenue, what
19 everybody's income is on a merit basis. Do you know that every single waiter makes
20 the exact same adjusted minimum wage whether they are good or not. Do you know
21 that every single waiter today shares in the tip that you gave this one waiter right over
22 here. How about if I have the opportunity to pay somebody what I think they're worth.
23 And what we're going to do for our servers because it is an outstanding profession for
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25
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many of them is to not only raise their wage to nine bucks per hour⁷ from two dollars thirty-five per hour⁸ but we're also going to institute revenue sharing for our servers so that just like today when the restaurant's revenues go up, they're going to have the incentive to sell and to make more money, so we're not going to take that away from them.

Bartiroma: I like it. I think you're selling me.

86. Meyer was also interviewed on a Comcast webeast around the same time:

Boat: You're changing tipping. You're changing the whole thing. So tell me about that.

Meyer: Well we're eliminating tipping in all of our restaurants over the course of 2016.

We started at The Modern at the end of 2015 and we just rolled it out two weeks ago at

Maialino, our Roman restaurant. And were doing these one by one because we are

learning more and more and more but it was important for us to take a stand on this for

a huge host of reasons. Some of them are philosophical, some of them are financial, and

I would say some of them are political.

Boat: So let's start with the philosophical reasons.

Meyer: The philosophical reason to eliminate tipping is that it's one of the most

demeaning practices in our entire society. If you are on the receiving end of a tip it means

that the person who is tipping you believes that you would not have otherwise

⁷The minimum wage in New York City for non-tipped employees (for employers with more than ten employees) increased from \$8.75 per hour to \$9.00 per hour effective December 31, 2015.

⁸The minimum wage in New York for tipped employees increased from \$5.00 per hour to \$7.50 per hour effective December 31, 2015. The federal tipped minimum wage is \$2.13, but it has no applicability in states with a higher minimum wage for tipped employees.

1 been nice to them or given them good service or prompt attention at a bar or given
2 them their coat back or whatever you know given them the coffee they had actually
3 ordered if you had not left them a tip. And it's complete nonsense. And if you're the
4 person whose performing that service and you are actually someone who takes pride in
5 doing a good job at the thing you're doing, you don't want the other person to think
6 that the only reason you did a great job, and suggested that bottle of wine is so that two
7 and a half hours later you could pick their pocket. Or you don't want to be somebody
8 who thought the only reason I actually brought you your coat back instead of some
9 other guy's coat back is because you're going to throw three dollars at me and buy
10 your coat back from me. So the other thing philosophically is that in the years that I've
11 been a restaurateur, what the tipping system has done is unfortunately created a huge
12 wedge and divide between people in the back of the house, whose hourly wage has
13 barely gone up in the thirty years that I've been in the restaurant business, and people
14 in the dining room who earn tips whose incomes have gone up about three hundred
15 percent cause what a tip is it's a multiplier of menu prices.

16
17
18
19 **Host:** That's really interesting.

20 **Meyer:** And menu prices have gone up. The tipped percent has gone up. But
21 meanwhile the hourly wage of back of the house employees has barely gone up and in
22 most states in the country including New York, there is something called the eighty-
23 twenty rule. It's a rule that says unless someone spends eighty percent of their time
24 face-to-face with a guest, they are not eligible to share in tips. So if you come to one of
25 our restaurants in New York or actually probably eighty percent of every full-service
26 restaurants in this country, tips are pooled. What that means is that you the customer
27
28

1 think, let's say you're one of those rare customers that uses your tip as a way to punish
2 someone for bad service which I think is kind of ridiculous because that should be my
3 job to not give you a raise or to fire you if you are giving bad service. So let's say you
4 are one of those people. So now you leave five percent or zero percent or ten percent to
5 prove a point, and you think you're really hurting that server, well you're really hurting
6 everyone in the entire front of the house because in a pooled house everyone is getting
7 that whack. Or if you're someone who thinks that you're going to get a better table next
8 time because you're a big tipper, which is ridiculous because the reservationists are not
9 allowed to share in tips. But let's say that you're someone who thinks you are going to
10 get a good table so you leave a big tip for that server, that's just getting shared with
11 thirty five other people anyway.

12
13
14
15 87. Unlike the mainstream media, many commentators have viewed with skepticism the
16 restaurateurs' claim they are motivated by social justice concerns:

17
18 Serving is one of the last jobs women with little education can do and make decent
19 wages to support their families. I served previously as a second job on the weekend
20 and the tip system motivated me to put out my best at every table. I enjoyed the
21 challenge and the fast pace of the job is motivated by the money collected at the end of
22 the shift. Restaurants will never pay \$20-\$30 an hour, and that is what good servers
23 make.

24
25
26 This is about a separate economy that exists in the restaurant business and how the
27 owners want to get their hands on it. I'll be willing to bet that Danny Meyer (and those
28

like him) were advised by their billionaire friends that they have millions of dollars
flowing through their restaurants and that they need to absorb and control it. Why else
would they all of a sudden care about their labor pool, of which, their history includes
passing legislation to pay people under the minimum wage and traditionally offer[ing]
the least amount of benefits possible (in most cases) and zero job security. This is
about the redistribution of wealth, which is only acceptable for the bottom up and not
the other way around. They want to take the tip money that servers earn and pay their
kitchen staff. That's it. ... The best part of this episode is the demonization of the
server and how it's unfair that they make so much more than the kitchen staff. Gee, I
always thought it was the owner's job to pay the kitchen staff?

Can [New York] *Eater* publish some article from who is against the no tip system that
will be NICE and FAIR? Why someone (restaurateur), that so far have always paid so
little to the back of the house, now sadly should change? WHY??? As owner, you
minimize your cost and maximize your profit: so you'll keep pay as low as you can
[for] your chefs, and now with the money that you "stole" from the waiter, you'll
badly pay your front of the house staff..... and eventually you'll become richer (and
cooler, telling friends and *Eater* that you do this for equality!!!)

Whose fault is it the back of the house isn't paid enough? It's the owner's fault. If
Danny Meyer thinks his employees need to get paid more he is free to pay them more.
The problem is he wants them to get paid more, but doesn't want to raise his prices and
doesn't want to decrease his profit. He is shifting from waiters to back of house. He is

~~100% robbing Peter to pay Paul. And no one in the media is asking the right questions
or the right people.~~

~~Congratulations on doing your part to muddy the waters on the no tipping issue. Once
again, this is REALLY about owners paying their cooks a proper wage, NOT robbing
the servers to pay the cooks. Which is what a no tipping model really is. The no-
tipping model is a perfect cover for more restaurateur shenanigans. The very same
tricks that have landed many, many restaurateurs of note (including the sainted Danny
Meyer) in tip related settlements/lawsuits.~~

~~It annoys me when chefs/owners who go the no tipping route view themselves as
progressive or noble. Newsflash: If you felt the cooks were underpaid, you always had
the power to raise their pay. You just chose to pocket the money yourself. Now all
you're doing is responding to minimum wage increases by raising prices to
accommodate a wage increase while you yourself "maintain the same level of
profitability" which is completely fine except you want to pat yourself on the back like
you're doing something noble. Just raise the prices and spare us the "we are proud to
lead the charge" and the "we hope to strengthen and promote a movement towards a
more equitable compensation system."~~

~~All of these moves are reactionary instead of progressive. Cooks have been underpaid
for years, why all of a sudden is a dramatic change being made? Because the~~

~~[minimum] wage increase is happening! Bingo! ... If you thought cooks were so~~

~~underpaid then you should have [paid them] out of your own pocket.~~

~~Maybe when they're doing all their financial modeling and forecasting they could~~

~~budget more money towards paying their cooks and work from there? Just a thought.~~

~~If higher cooks' pay were prioritized, it would happen without taking tips from servers,~~

~~bussers and bartenders.~~

~~[T]ipping isn't creating a wage disparity or low BOH wages. In fact, it's what allows~~

~~restaurateurs to pay BOH a living wage. Catch is, restaurateurs must be willing to curb~~

~~their profits a bit.~~

~~Meyer would have us believe that the reason he is banning tipping is to reduce wage~~

~~inequality between servers and cooks. I call "B.S." ... It's pure capitalist genius~~

~~eloaked as crusading socialist justice.~~

~~As a retired bartender in NYC for 35 years, we know what's going on... Steal the~~

~~waiters' tips in a roundabout way to pay others in the restaurant. ... All the food sites~~

~~like eater.com and the NYT only have been promoting the owners' side of the story...~~

~~as I've said in the past, pay the kitchen and floor managers more\$.~~

~~Danny Meyers has been in charge of how much kitchen staff makes, not the servers.~~

~~Now deciding that Front of House makes too much money (is that possible in New~~

York?) he is trying to redistribute server's wages. So are servers really supposed to believe owners will have their best interests in mind when they have proven to not raise kitchen wages in years?

If you want to pay your kitchen staff more, just F***ING do it. Nothing was ever stopping you. Hospitality Included will result in a pay cut for hundreds. Period. Don't make yourself out to be a fair wage pioneer. If you want to be truly fair, how about medical coverage. How about eliminating "at-will employment?"

I'm sure the same industry that has lobbied to keep the server wage at \$2.13/hr for decades will be very fair with their #notipping policies. How many people have put themselves through college with their tip money? I personally know two dozen.

wow!!! they make more money?? wow?? how? Ah ... yes ... they taking the tips from the waiters and putting in their pocket... great management!! and great article (or was [it] a press release hard to find the difference)

As a restaurant owner, so much of this is questionable, most notably, [The Modern Executive Chef Abram] Bissell's claim that The Modern only generates a 7% profit. When you take into account that they pay their senior line cook just \$24k/year (something I'd be ashamed to admit in private, let alone on public radio), it's clear something is amiss.... In short, no one takes on the high risk and hard work required to open a restaurant just to make a 7% profit. These are either real estate investments

~~disguised as restaurants, or the owners and executive staff receive highly inflated salaries. Before reporting on an issue with such great potential to impact an entire industry, I suggest next time the Freakonomics crew scratch the surface a little deeper.~~

~~I agree BOH should be paid better. Interesting how Mr. Meyer and company are "wracking their brains" to offset the disparity when Mr. Meyer is worth a current estimate of over \$386 Million. Instead, the message is that FOH employees are overpaid.... [T]he record profits they saw were a direct result of a revenue stream that was going straight from customer to server go instead to Danny Meyer directly which he used to increase the salaries of floor managers and yes give BOH employees a modest wage increase.... Was this [Freakonomics] episode an attempt at journalism or just a commercial for Danny Meyer's establishments?~~

~~Call me cynical in 2016, but, I find it hard to believe that the restaurateurs who are crusading for this No Tip policy are altruistically trying to figure out a redistribution rather than simply trying to get THEIR hands [on] the cash left on the table. Please.~~

~~Owners are jacking employee tip jars across the country. DUHHHHH~~

88. 17 On **October 17, 2015**, Meyer congratulated Camino via Twitter for "'leading the way."

89. On **October 18, 2015**, USHG said it would share best practices regarding hospitality included at its upcoming October 27, 2015 town hall.

90. ~~On October 19, 2015, USHG tweeted "listen in on the growing dialogue around~~

~~#HospitalityIncluded, and ask us questions #hospitalityincluded@ushgnyc.com."~~

91. ~~On or about October 15, 2015, Meyer told Bill Ritter of ABC7 New York that in~~

~~order for hospitality included to work "we've got to see a number of our industry colleagues~~

~~convert and adopt this themselves. . . . The biggest challenge we are going to have Bill to~~

~~making this all work is that if people come in and we're the only guys who are raising their~~

~~menu prices enough to pay for this ourselves and we're going it alone, it's going to be a tough~~

~~thing.~~

~~92way."~~

54. On October 27, 2015, USHG held a town hall at the Martha Washington Hotel in New

New York City, at which it discussed its decision to end tipping and increase prices. The meeting was hosted by

Journee, a trade association of restaurant owners and hospitality professionals. ~~USHG~~ ~~tweeted~~

USHG tweeted to Journee founder Anthony Rudolf: "Thank you for hosting the industry talk.

Looking

forward to keeping the conversation going!"!"" Gwyneth Borden attended the town hall.

93. ~~On November 2, 2015, USHG sponsored a town hall to discuss and answer questions~~

~~regarding hospitality included. Meyer tweeted: "So grateful to see so many guests for joining~~

~~us to dialogue on #hospitalityincluded." USHG said at the town hall that the price of a meal~~

~~after the implementation of hospitality included will increase about 5-8 percent over what it~~

~~was prior to implementation.~~

94. ~~In November 2015, Joe's Crab Shack ("Joe's"), announced it would "lead[] the~~

~~industry" and switch to no tipping and increase prices by about fifteen percent at 18 of its~~

25 — ~~restated in the 1990s, causing it to change its current trading policy.~~
26 — 95. — ~~On or about November 15, 2015, Colicchio said on CNBC's On The Money that he~~
27 — ~~eliminated tipping because "I think that I should be able to control or at least compensate my~~
28 —

1 staff. We know that studies at Cornell University [show] that the amount of money left at a tip
2 has very little to do with service. It has more to do with your accent, your race, and your
3 gender, as a server, and so I would prefer to compensate my staff."

4 96. On or about **November 19, 2015**, USHG implemented hospitality included at The
5 Modern. The menu prices did not all increase by the same amount. As one example, the price
6 of a three-course dinner increased from \$98 to \$122, an increase of 24.5 percent. In addition,
7 the extra sales tax (8.875%) on that meal is \$2.13 (0.08775×24).

9 97. The Modern's December 2015 profits were the highest ever because, according to
10 Meyer, "doing the right thing is the most profitable thing." Meyer also said that "all of our
11 leaders in all of our restaurants are clamoring to be next. They all want to do this because they
12 have seen some pretty compelling statistics."

14 98. On **November 20, 2015**, Meyer told the Chicago Tribune that USHG's economic
15 modeling shows that after hospitality included is implemented, 100 percent of its employees
16 would do at least as well financially and 75 percent would do better. The article also quotes a
17 Chicago restaurant owner who eliminated tips saying that he has heard from "pretty much
18 every high-end restaurant in the country" asking about his no-tip, mandatory service charge
19 model.

21 99. On or about **December 2, 2015**, Eleven Madison Park announced that it would end
22 tipping and raise prices. Including taxes, it increased its prices by approximately 30 percent
23 effective January, 2016. Eleven Madison Park was represented at the meeting referenced in
24 Par. 79 above.

100. On December 8, 2015, USHG's held a hospitality included town hall, hosted by the
Institute of Culinary Education. USHG tweeted: "Big thanks to @iceculinary for hosting our
second #HospitalityIncluded town hall. Excited to share best practices!"

101. On or about December 14, 2015, Huertas announced it would end tipping and raise its
prices. Alder said that he would help other restaurants adopt a no-tipping model and give them
"the confidence to make this change a reality." Alder has also said: "Can we start something
bigger than Huertas? Can we help other restaurants get to this point? If we're a leader in the
movement, you've got to feel pretty good about where you're going. I'm super passionate
about this. If we can get this passion to flow through the ranks, through our staff, throughout
industry, then we're going to be in really good shape." Huertas' website states that "[w]e
believe that this is the future of dining in New York City and are proud to lead the charge
alongside our former employer and mentor Danny Meyer and his Union Square Hospitality
Group." At the time of the announcement Sagaria tweeted "Starting today @huertasnyc Will
Eliminate Tipping." Upon information and belief, Huertas was represented at the meeting
referenced in Par. 79, above.

102. On or about December 15, 2015, Tarlow announced that he would end tipping and
raise prices at all of his restaurants. He said that "having Danny out in front of it has been a
huge impetus for us to take the plunge." Sagaria tweeted regarding the announcement: "Big
(and inspiring news) today!" Upon information and belief, Tarlow attended the meeting
referenced in Par. 79, above.

103. Around the time of his announcement, Tarlow hired a designer to create an open-
source "gratuity-free" logo, which is available for free at gratuityfree.nyc. The website states:

Are you an operator that has already moved or is planning to move to a Gratuity Free model? You can use the logo we created to let your guests know that the prices they see on your menus include service.

Enter your information, and we'll get back to you with more on the Gratuity Free logo and high-res files.

By submitting this form you agree to the terms of our *Privacy Policy* and consent to us communicating with you.

The logo is currently being used by restaurants in New York, California, Oregon, and, upon information and belief, elsewhere.

104. On or about **December 17, 2015**, Fedora announced that it had "joined a movement of like-minded restaurants in adopting a hospitality-included model that eliminated tipping."

Sagara tweeted at the time: "More existing news! Much respect and admiration for @gabrielstulman & team for taking this step." Fedora subsequently reverted back to a tipping model, though Stulman said he "continues to believe that [no tipping] has the potential to change hospitality for the better" and is "thankful for the support of our colleagues who remain committed." Upon information and belief, Stulman attended the meeting referenced in Par 79. above.

105. A survey of New York City restaurant goers released on or about **January 7, 2016**, showed that the majority like tipping, think it is a good system, and are not confused by it.

106. On or about **January 8, 2016**, David Chang ended tipping at his new restaurant Nishi, located in the Chelsea neighborhood in Manhattan. Upon information and belief, Momo was represented at the meeting referenced in Par. 79, above.

107. On **January 18, 2016**, Journee hosted a conference titled "Learning From No Tipping." Sagaria and Adler presented. An industry consultant tweeted: "This issue has brought ppl together in the industry that no other issue has."

108. On **January 26, 2016**, The Ford Foundation hosted a "discussion" on Suru Jarayama's new book Forked: A New Standard for American Dining. Jarayaman co-founded and co-directs Restaurant Opportunities Centers United ("ROC"), an Oakland-based 501(c)4 organization funded in part by the Ford Foundation that purports to represent the nation's restaurant workers, and yet supports the no-tipping movement even though it has and will substantially reduce income for thousands of restaurant workers, many of whom are women of color with children.

109. ROC created Restaurants Advancing Industry Standards in Employment ("RAISE"), an association of about 200 restaurants that is a "supportive community of peers around the country, and financial resources to meet and visit with peers in other parts of the country to learn best practices." RAISE members purport to take "the high road to profitability," by, among other things, eliminating tipping. Colicchio and Meyer were early members of RAISE.

110. The ROC website identifies 215 restaurants that are taking the "high road" to profitability, including 75 in Madison, Wisconsin, 35 in New York City (including Craft and USHG), 21 in the Bay Area, and five in Chicago (including GreenRiver). "These businesses meet our high road criteria and are known leaders within the sustainable and fair food movement in their communities."

111. In an interview, Meyer told Jayaraman that tipping "gets into questions of justice,
politics, social norms, economics obviously, class warfare, gender and race, and as you told
me, the thing that makes me more inspired as anything is that, if you do not have your head
buried in the sand and you have noticed that there has been a widening gap between those
who have a lot and those who don't have enough."

112. Meyer was a featured speaker at the January 26, 2016, discussion:

Thank you so much and thank you all of you guys for being here tonight. Hi Tom
[Colicchio]. I knew you'd be here. So this has been a fascinating journey, and I've been
so educated by Saru.... And I didn't have the courage but I did have the interest about
21 years ago when, right about the time that I opened a second restaurant, Gramercy
Tavern along with Tom Colicchio and we were looking at tipping and kind of the
problems with tipping but from a very, very different perspective than we are looking at
it today quite frankly. I think it, just a quick and important thing for you guys to
understand that back then the ignominious of tipping was that you would have waiters
who would sometimes not have the opportunity to make the same money one night as
compared to the next, and not know what they could make because of the ignorance of
diners who might have thought that because the food was taking too long to get out of
the kitchen, which had nothing to do with the waiter, maybe we should punish the waiter
and not leave much of a tip. And there were nights when waiters would be crying or
sometimes running out on the street after guests, neither one of which was a good scene.

1 And so that was kind of a motivator to say why do we need tipping? Why can't we do
2 it ourselves? Frankly I didn't have the courage to change it because waiters themselves
3 didn't want the change to happen. Back then, not all tips were being reported as
4 income....

5
6 But what's happened all these years later and I really want to chalk this up to good
7 luck which is running into Darren [Walker, President of The Ford Foundation] on an
8 airplane, I'm going to guess what about a year ago.... and not two weeks after that
9 getting a call from Darren saying "you know, I don't know if you've ever met this
10 person that I know and respect so much named Saru," and I almost ran the other way
11 when I heard her name because as much as I have been educated as a restaurateur by
12 the work that Saru, it's true, the work that Saru has done with ROC and I truly have
13 been educated and sensitized to some very, very different issues with respect to tipping
14 that do not exist in the fine dining world but that do exist in a huge percentage of
15 restaurants that are not fine dining restaurants in this country.

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20 As a business person, my style has always been to learn from people who have figured
21 this stuff out way before I did, and then try to see if it really jives with my sense of
22 justice; how it can be pragmatically put into practice as a business and make it work.

23 We think it is good business to have restaurants be sustainable. They are not
24 sustainable with the current system of tipping. And the reason they are not sustainable
25 and what has changed dramatically over the thirty plus years that I've been a
26 restaurateur is that every single time prices on the menu have to go up because
27
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underlying costs go up, whether it is rent or insurance or linen or flowers, or the cost of protein, the cost of any aspect, what happens is that the tip-eligible employees make more money because as the cost goes up, the multiplier called the tip therefore goes up, but nowhere along the way do restaurateurs tend to also pay their back-of-the-house tip-ineligible workers more because then the menu prices would have to go up even further, and then the disparity would only increase over time.

So quickly, let me just recap. Thirty years ago we did not have nearly the disparity between what you could make in the dining room and what you could make in the kitchen. And the cost of living in any town, never mind just New York, was quite a bit lower. So truly, you could come to work at a restaurant thirty years ago, you weren't going to get rich by being a cook but you could at least pay your rent. Today, while the cost of living has gone up at least three-fold since I first became a restaurateur, the hourly compensation for cooks and other non-tipped employees has gone up a whopping 35 percent.⁹

In that same time, tipped employees with the adjusted minimum wage, have been able to make in fine dining at least 350 times as much. Try and imagine being a football coach and your defense gets paid 350 times, 350% more and your offense only gets paid 35 percent more and go back into halftime and try to make everybody feel real good. You can't do it, and nor are you ultimately going to be able to attract the next

⁹ Meyer has also said (Par. 124, below) that cook salaries at Union Square Cafe increased from about \$10-11 in 1985 to about \$11-12 in 2015, which is an increase of approximately fifteen percent.

~~generation of kids who say when I grow up I want to play offense on a football team.~~

~~And where we have a situation where culinary students can only afford to be waiters~~

~~and cannot afford to be cooks, that's a serious problem in terms of the sustainability of~~

~~our industry....~~

~~And we cannot say that we care about fairness, economic fairness, we care about this~~

~~country, and know that the hospitality industry is the second largest employer in this~~

~~country after the government, and say that for at least half the people who work in the~~

~~industry, they can't even afford to be in this industry but it's the only job they can get.~~

~~So I'm so grateful for the activism, the education, and also for the convocation that~~

~~Darren has done by bringing me together with Saru, our organizations together, and~~

~~really for our entire industry because in addition to I think probably doing more to~~

~~increase the potential standard of living for a huge swath of our country, I think what~~

~~you are doing right now has the ability to actually save our industry. Thank you so~~

~~much.~~

113. Jayaraman said:

~~In 2015, something extraordinary happened. Darren brought Danny and I together. We~~

~~spoke. I also spoke with Tom Colicchio. We talked about these issues maybe for the~~

~~first time. We'd been talking about them, but more directly for the first time. And~~

~~Danny Meyer and Tom Colicchio decided to go one step farther. They said we don't~~

~~actually just want to pay a minimum wage, we don't want to pay a livable wage, we~~

1 want to pay [] a thrivable wage. And because they were able to pay that thrivable wage,
2 they were able to eliminate tips altogether. A huge and incredible move.

3
4 114. Jayaraman moderated a panel during this discussion:

5 **Jayaraman:** So we have a short panel to hear from these amazing folks. I wanted to
6 start with Danny if that's okay, and just talk to you a little bit about hospitality included
7 and the move. I know that we've talked about how we may come at it from different
8 vantage points, but ultimately I think we are headed in the same path. So could you say
9 a little bit about that and how you see it from your vantage point?
10
11

12 **Meyer:** Well I think what you are doing with respect to One Fair Wage,¹⁰ if that were
13 to sweep this country, I think the entire tipping question would almost become a moot
14 point. Because every time minimum wage does go up, restaurateurs have to raise their
15 prices. And because they raise their prices, tipped employees will continue to make more
16 money. Unfortunately, that will increase the disparity between tipped and non-tipped
17 employees. So if there were one fair wage whereby the two dollars and thirteen cents or
18 two dollars and forty three cents or whatever they figure that to be becomes
19 seven fifty or nine dollars, which is what we are paying at The Modern right now, plus
20 a revenue share on top of that, there is no way tipping is going to survive at that point.
21 It just can't because if the minimum wage were to go up to say ten dollars, it wouldn't
22 be, it would be twelve dollars, or thirteen, fourteen, fifteen, now all of a sudden the
23 menu prices are going to become so high that diners will revolt about paying a tip on
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28 ¹⁰ One Fair Wage refers to the elimination of a separate tipped minimum wage.

1 top of that. They won't. They just won't do it. And I think there will be a collision
2 which is great between what you are advocating for and those restaurants who are
3 eliminating tipping so that it is all going to come together as one.

4
5 **Jayaraman:** I know Tom wanted to speak out about how he can bring the public
6 along.... What we need of the public and consumers to support the high road.

7
8 **Colicchio:** Quick numbers. If minimum wage goes up to fifteen dollar that means that
9 that it is the porter who is making fifteen dollars an hour. Cooks are making eighteen,
10 twenty dollars. Waiters are making thirty dollars an hour at that point, thirty five
11 dollars, forty dollars an hour, okay. Now if and when, when I implement tip free, I'm
12 going to raise my prices by twenty percent, twenty two percent. On top of that I would
13 have to raise prices by another twenty four percent. So we're talking about almost a
14 fifty percent increase if minimum wage goes to fifteen dollars an hour and there is one
15 fair wage for everybody. On top of eliminating tips.

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19 Now it may be double dipping according to what you [Meyer] are saying because tips
20 are going to be eliminated anyway. You may have to because nobody is going to go
21 along with a fifty percent increase. So we're [Meyer and I] kind of saying the same
22 thing. We're coming at it very differently. And so, when I say we need the public to
23 come around for the high road, they need to get used to the fact that it is going to cost
24 more money to go out to dinner. Simple fact.

55 of 79

1 So I'm all for an increase. One fair minimum wage. But journalists that are out there.
2 You're going to have to start getting used to seeing prices increased. Now it's going to
3 get tiered, factored in over a period of time, and so, but other things are going to go up
4 too, not just wages. Because the person who is delivering the food is now going to make
5 fifteen dollars an hour, food is going to cost more. Person at the laundry is going to be
6 making more money. Our laundry is going to cost more. Everything is going to go up.
7 So you have your classic inflation that sort of is going to set in into restaurants.

9
10 So we all want this. But we have to get the message out to the public, why we're doing
11 this, why it's important, and especially in a city like New York, a liberal city like New
12 York, how the public will start complaining about this, that they don't want to pay more
13 yet they want to see everybody make more. And so we need to educate the public on
14 why this is happening and how we can make it happen. We can't do it alone. We need
15 everyone to help out here. So if we want to create a fairer wage, it has to be fair across
16 the board for everybody.

17
18
19 115. Jayaraman travels around the country arguing to local policy makers that servers at

20 casual sit-down restaurants such as IHOP and Olive Garden make about \$1.50 in tips per
21 hour, and hence a wage of \$15 without tips would be a significant raise. Upon information
22 and belief, currently servers at IHOP and Olive Garden on average earn more than \$15.00 per
23 hour including tip, where the average check per person is \$16.50, on average make over
24 \$15.00 per hour in tips alone, and a \$15 flat wage would be a significant decrease in pay.
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~~116. On January 30, 2016, television personality Anthony Bourdain said about the no-~~

~~tipping movement: "As Danny goeth, so shall the rest.... For a whole lot of reasons, it's the way of the future."~~

~~117. On February 2, 2016, USHG's held a hospitality included town hall at the Redbury Hotel. USHG tweeted: "How does no tipping work at @The ModernNYC and @maialino_nyc? Come find out at our #HospitalityIncluded Town Hall."~~

~~118. According to a February 3, 2016 article, Meyer and "30 fellow restaurateurs have committed" to elimin te tipping, "and dozens of restaurants have followed suit."~~

~~119. On February 25, 2016, USHG implemented hospitality included at Maialino.~~

~~120. A March 2016 study by UC Irvine economics professor Richard McKenzie found that ending tipping will substantially reduce the income of many servers.~~

~~121. On March 2, 2016, the Alliance sponsored "The Tipping Conference." The conference summary states: "An unprecedented 50% increase in the tip wage combined with other operational challenges has the hospitality industry and the dining public buzzing. The NYC Hospitality Alliance will again bring the restaurant industry together for candid conversations about gratuities, the law and eliminating tipping in lieu of alternative compensation models." Sagaria and Colicchio presented. Sagaria tweeted regarding the meeting "Thanks for bringing the industry together and keeping the conversation going."~~

~~122. On March 4, 2016, industry consultant and television personality John Taffer said the no-tipping movement benefits owners at the expense of servers.~~

~~Most waitresses and bartenders can make more than the \$14 or \$15 an hour in tips that~~

~~the restaurant is going to pay them. So I think it's sneaky. I put 18 percent gratuity on the check, I pay you \$15 an hour and I run a negative 4 percent labor cost. fml'm making~~

money on your back. Those excess tips are kept by me, not you. And I think ~~there's~~there's

~~2~~ something inherently wrong about it.

~~123~~USHG Takes a Leadership Role in Moving Industry to No-Tipping Model

56. On March 10, 2016, ~~Sagaria~~a representative of USHG tweeted that the no-tipping movement is—

“an (ultra)

~~4~~ marathon. Not a sprint. One restaurant at a time.”

~~124~~57. On March 11, 2016, ~~Danny~~ Meyer was interviewed by Bon Appetit Editor Adam Rapoport at

the South by Southwest Conference ~~(“SXSW”)~~ in Austin on the topic ~~“Will ‘No-Tipping’~~

~~Save the Restaurant Industry?’~~ Meyer ~~commented, inter alia:~~

~~a. said that~~ USHG ~~“felt an obligation to lead on this,”~~ and runs a ~~“help-line”~~ for

~~10~~ restaurants interested in switching to a no-tipping business

model.

~~b. A and a~~ no-tipping model can work at all types of restaurants and price

points.

~~c. He would prefer a surcharge to higher menu prices because “it would~~

~~allow our menu prices to remain apparently competitive with everybody,”~~

~~but surcharges are probably illegal in New York City.~~

~~d. The switch to no tipping at The Modern increased profitability. “If you~~

~~do the right thing you actually end up being more profitable.”~~

~~e. An entry-level line cook at The Modern prior to the switch earned about ten or eleven dollars per hour,”~~¹⁰

58. In 2016, Meyer said in an interview that he believed that Hospitality Included “would not

~~succeed unless our industry would convert,” and by the way that ten or eleven~~

~~Union Square Cafe [in 1985]. Completely ridiculous."~~

~~f. After the switch, the salary for a beginning server increased from \$7.50
(the tipped minimum wage) to \$9.00 (the regular minimum wage effective~~

December 31, 2015), in addition to a revenue share of 13.5 percent of top-

line revenue for all employees, and

g. Top line revenue numbers are disclosed to all staff.

125. On **March 12, 2016**, Chang tweeted "No tipping policy is advantageous for diner and "many, many" restaurants in places with larger dining rooms. I think 90-120 seats is sweet spot: learning." have converted.

126. On or about **March 22, 2016**, it was reported that a server at The Modern said that his income decreased approximately 15-20 percent after the elimination of tipping.

127. On or about **March 29, 2016**, Chang¹² He also said that servers at no tipping restaurants are

"getting capped out" and "could be making a lot more if they were taking tips," and that a no tipping policy "allows restaurant owners to remix the way USHG has "a team of two or three people spending A LOT of their service charges are distributed to their staff, which we gotta do if we're time going to hang onto the best kitchen talent."

128. ¹³ on ... industry panels talking about how we're doing it," and that "we have invited industry members to our town hall meetings" to discuss and consult on hospitality included. USHG is simply being "transparent" with the industry, according to Meyer.

58.59. On April 11, 2016, GGRA held its second annual conference in San Francisco. The Program says "[states that "[t]he San Francisco Bay Area Restaurant Community is poised to lead the

nation on solutions to the industry's industry's most vexing problems." Defendants Vogler, and Hoffman, and Sagaria

together with a representative of USHG, presented on the opening panel, titled "entitled "The Tipping Point: A Year Later." USHG tweeted

afterwards that it was "honored to share in the dialogue and learn from our west coast peers."

129. On **April 18, 2016**, Colicchio said during a Bloomberg interview that the no tipping movement may succeed if a lot of restaurants switch:

23 ~~At Craft, if I were going to pay my servers an hourly wage that is on [a] par with what~~
24 ~~they're currently making, it would be in the neighborhood of \$34 an hour. So back~~
25 ~~waiters or bussers in the range of \$22. They're making a good wage because of tips.~~
26 ~~Now, we do away with tips. The only way to fund that would be through raising~~
27 ~~prices. If the average tip is about 20 percent, we still have to raise prices 23 percent,~~
28

1 because then you're going to push up wages for everyone else. If I were to do it tomorrow,
2 it puts me at a competitive disadvantage to someone who is just shopping online looking
3 at prices. If everyone does it, then I think we'll see some change. The younger generation,
4 millennials who are going out to eat, they're used to not leaving tips. If you look at
5 companies like Uber, I love the fact that I can walk out of the car and not worry about a
6 tip. So I think it's going to change, and I think 10 years from now we're going to look
7 back and go, "Oh, God, do you remember when we used to tip?"¹¹ Just like now we say,
8 "Remember when you used to smoke in a restaurant?"¹²

10 130. On April 28, 2016, USHG implemented hospitality included at North End Grill.

12 131. In or around May 2016, American Express released a survey of 503 randomly

~~sampled U.S. restaurants. Eighteen percent had adopted a gratuity-free model. 29 percent said they plan to adopt a gratuity-free model, 17 percent said they may do so if other restaurants followed suit, and ten percent were undecided. Twenty-six percent said they had no present intention to end tipping.~~

~~13260.~~ On May 1, 2016, USHG sponsored a ~~"~~"talk and open house"~~"~~ at its GreenRiver restaurant ~~restaurant~~ in Chicago ~~titled "entitled "~~"Tipping the Scale: Wages, Workplace Culture and the Gratuity-

~~Free~~

~~Future."~~Sagara presented and." Defendant Vogler was scheduled to present there, but his flight was delayed. Prior to

the meeting, USHG tweeted ~~"~~"Join us. Industry leaders will be sharing tips on tipping."~~"~~
~~tipping."~~

~~133,~~ ~~On or about May 4, 2016,~~ Joe's announced that it would start accepting tips again at ~~fourteen of the eighteen restaurants that had eliminated tips in November 2015, because customers didn't like the no-tipping system and servers "voted with their feet" and quit. Bob~~

~~Merritt, the CEO of Joe's parent, Ignite Restaurant Group, Inc. said "[w]e are going to try to~~

Survey Shows that Almost 50 Percent of U.S. Restaurants Have Adopted or Intend to Adopt a Gratuity-Free Business Model, and that Others May Participate if Their Competitors Follow

61. In or around May 2016, American Express released a survey of 79503 randomly-sampled

figure out why it worked in some places and why not in others. The way we look at it is: We are really continuing the tests in place with where it works." Upon information and belief, representatives of Joe's discussed its no-tipping plans with other restaurant groups at trade association meetings and elsewhere.

American restaurants. Eighteen percent had adopted a gratuity-free model. Twenty-nine percent said they plan to adopt a gratuity-free model. Seventeen percent said they may do so if other restaurants followed suit, and ten percent were undecided. Twenty-six percent said they had no present intention to end tipping.

Defendant Vogler Returns to Tipping Because of Server Attrition, Yet He and Other Industry Leaders Still Support Concerted Price Increases and Elimination of Tipping

62. On May 15, 2016, defendant Vogler saidstated on PBS'sPBS's Weekend Edition that he wentback to

back to tipping because of server attrition, and because othersof other restaurant owners who had said

they would switch but did not switch:

switch:

We were losing staff. Servers mostly ... We were continuing to hire young new

people, train them, and then they would get the set of skills necessary, and they would

generally give notice and move to other restaurants in our community who were still on

on a traditional tip economy.

It has been a tremendous amount of work, and we all remain very much in favor of it,

ideologically, and I, like many, think it may be the way things are going. We just

started to feel like an ideologue, insisting on this way of doing it when others in our community that had said they would switch were not switching. So it really ~~wasn't~~ wasn't happening after a year the way we had thought it might.

Vogler ~~said~~stated that one mistake he made was to ~~only~~ increase prices by ~~twenty~~merely 20 percent, and that

some

restaurants "making the switch now are raising their prices by more like ~~forty~~40 percent."

Vogler further ~~said~~stated that profits increased when he ended tipping, and that he remains interested in implementing the policy in the future if more of his competitors do likewise.

134. On or about **June 4, 2016**, Chang ended his no tipping policy at Nishi and lowered the menu prices. He said that "[t]his is by no means the end of the no tipping discussion at Momofuku. But at this moment, we think a tipping model will benefit our guests and staff."

136. On **July 14, 2016**, USHG implemented hospitality included at Marta.

137. On **July 15, 2016**, Colicchio said on Larry King Live Now that "I just don't see why professional waiters who are working in great restaurants, why they want to be subject to someone's whim when it comes to paying them."

138. On **November 2, 2016**, USHG Chief Culture Officer Erin Moran was the keynote speaker at the 2016 Colorado Restaurant Association ("CRA") Conference in Denver. She discussed USHG's implementation of hospitality included, the amount and manner in which prices were increased, impact on employee compensation and retention, difference in implementation in different restaurant types, communicating the change to employees and customers, economic modeling, mistakes made and lessons learned, etc. She showed the audience an USGH produced, three part animated video series on the "history of tipping," the "economics of tipping," and "investing in the future of the hospitality industry" with hospitality included. She said her biggest regret is that hospitality included was not implemented sooner. She said that the elimination of tipping was her idea, and that herself, Sagaria, and Ashley Campbell, USHG's Chief Financial Officer, were the key people involved in implementing hospitality included. She said that USHG held a number of town halls with "colleagues" (i.e., competitors) at the time USHG announced its implementation of hospitality included to educate them of its plans. She said that USHG subsequently has had conversations with its "industry peers" regarding hospitality included and that USHG would be sharing financial information with them regarding the impact of hospitality included. She

1 said that FOH retention levels did not change after the implementation of hospitality included.

2 She said that The Modern was selected as the first to implement hospitality included because

3 it has three different concepts within one business—the bar room with a more casual type of

4 service and menu, the formal dining room, and a private dining room for large events. Also,

5 The Modern customers are less price sensitive as compared to customers at some other USHG

6 restaurants, and The Modern had one of the strongest leadership teams who could "figure this

7 out." In a question and answer session, Beth Gruitch, CRA representative and co-founder of

8 Denver's Crafted Concepts restaurant group, said to Moran—"what an honor and what a

9 wealth of knowledge.... It's been quite the journey for you all and you know we're about to

10 embark on [hospitality included] here in Colorado a little bit so we're kind of tiptoeing around

11 these things ... "

12 139.—On or about **November 10, 2016**, USHG settled for \$700,000 a class action alleging it

13 unlawfully required tipped employees to share their tips with non-customarily tipped

14 employees including managers.

15 140.—On **November 16, 2016**, a hospitality conference was held in Brooklyn titled

16 "Hospitality Included: One Year Later" to discuss "trial and error." The panel included Adler,

17 Tarlow and Dino Laverini, USHG's Director of Operations.

18 141.—On **December 1, 2016**, Gramercy Tavern implement hospitality included.

19 142.—On **December 12, 2016**, Meyer discussed his decision to end tipping on a Motley Fool

20 podcast:

21 It came about, really, for a number of reasons. It's something I've thought about, really,

22 for 20 years, because I just think that it's a crazy system that never should have started

23 in the first place. It was a system that started literally the day after slavery was

abolished in America and two different industries, the restaurant industry and the Pullman train car industry, successfully petitioned the government to allow for nonpayment of part of the workers because they proved that they could get their customers to pay those people instead.

And the notion that a tip is actually an indicator or a predictor of the kind of service that you are going to get is also ludicrous, because the implication is that the tipping system prevents bad service, because the waiter or waitress is afraid that you're going to stiff them, which is already an adversarial and negative connotation.

But for anyone who's ever had bad service, obviously the tipping system didn't prevent it. And then what it encourages is one of two things — either trying to punish the server with a bad tip, which feels horrible because how do you know that the food took too long because of the waiter? How do you know that wasn't something that happened in the kitchen? Or how do you know that it wasn't because another table was late getting to the restaurant and the kitchen got backed up. So it's a completely false predictor and/or reward or punishment system for service.

And then furthermore, the worst part of it today is that because by law tips are not legally able to be shared with cooks in the kitchen, what it means is that you've created a huge disparity between what a tip-eligible person can make and what a non-eligible person can make. And so we've had, in the 30 years I've been in the restaurant business, about a 250% increase in compensation for tipped employees and about a 25% increase for non-tipped employees.

And that's horrible and it's unconscionable to say in our culture we care for our employees first, but we only care for part of our employees. It would be like if you went to a football game and you paid the offense 10 times as much as you paid the defense, and then you expected halftime to be Kumbaya. It's just that people don't feel good.

So we decided to take things into our own hands and get rid of it. And we think we need to do it for the very sustainability of our restaurants in a city where every time menu prices go up (which they do, because real estate continues to go up, health insurance goes up, labor, minimum wage keeps going up). Every time that goes up in a tipping restaurant and you have to tip on top of higher menu prices, the disparity between what a tipped employee and a non-tipped employee just increases.

And so we decided instead of complaining about it, or saying, "Well, that's horrible, but that's just the way it is, that's the system." Whoever wrote the rule that we can't address the system and correct it ourselves?

On January 2, 2017, Meyer said that "tipping is actually one of the biggest hoaxes
143.

ever pulled on an entire culture, the American culture.... There's just nothing good about it."

He also said during the same interview that starting hourly pay for USHG back-of-house employees increased only twenty percent over the thirty-one years prior to the implementation of hospitality included.

144. On or about January 4, 2017, Boulder, Colorado restaurateur Bobby Stuckey said that "hospitality included ... will end up being one of the biggest game changers in the industry. While it is going to be hard to execute, it will in the long run be the best for our fun but crazy industry."

145. On January 17, 2017, Meyer said that profits at USHG restaurants implementing a no tipping policy dropped initially (contrary to what he had said earlier), but "came back up" as the managers learned to "operate under a new economy."

146. In and around February 2017, the NYC Hospitality Alliance has lobbied New York City government officials to allow restaurants to impose surcharges. The City directly benefits from the conspiracy through greater tax revenues because sales tax is not collected on tips but is collected on increased prices or surcharges.

147. On March 5, 2017, Sagaria presented on hospitality included at the Charleston Wine and Food Exposition ("CWFE"). Sagaria said that restaurants need to switch to a service-included model and that a "policy mandate" to include service in pricing would help stem the flow of servers to other restaurants. He further said "we need to figure it out now or there won't be a tomorrow" and that there is no one-size-fits-all model and within USHG they employ different modes of implementation at different restaurants. A conference summary says that tipping "represents a large, culturally engrained power dynamic that's difficult for any one restaurant to change. If we are really committed to finding a way to reduce the wage and power disparity in our restaurants, build continuity and sustainability into the business and employment model, and treat everyone fairly, and we agree that abolishing tipping is the way to do that, it may take the entire industry ... to get behind it." Following the conference, Sagaria tweeted "Thank you for a thought provoking and timely dialogue on #HospitalityIncluded" and "TY for continuing the conversation! We can all agree something needs to change. The biggest question is how our industry makes that change." CWFE tweeted in response: "Some doing different models during the day—counter service then table service at night. No one way to tackle."

~~148. On March 27, 2017, RAISE hosted the Diners United and Tipped Workers Resource~~

~~+~~

~~Center Conference in D.C. Participants discussed "business practices and strategies to promote the High Road to profitability," including, upon information and belief, the strategy of eliminating tipping and increasing prices.~~

~~149. On March 28, 2017, Sagaria participated in a "dynamic dialogue" on hospitality included sponsored by the Chef Action Network, a national association of restaurant owners.~~

~~150. On or about June 6, 2017, Sagaria said that switching to hospitality included is like "opening a restaurant all over again," but USHG remains committed to implementing hospitality included at its remaining NYC restaurants.~~

~~151. On June 16, 2017, Meyer and Sagaria spoke about hospitality included at the 2017 Food and Wine Classic in Aspen, Colorado. Meyer said "we have to stop blaming the tipping system for cooks not getting paid well. You can pay people the way you want to pay people~~

~~152. On July 20, 2017, Sagaria presented on Hospitality Included to bar and restaurant owners and managers at the 2017 Tales of the Cocktail festival in New Orleans. He reportedly told the audience that prices on many menu items increased by 40% following the implementation of hospitality included.~~

~~153~~64. On July 24, 2017, Meyer said during an interview that he remains committed to hospitality included, and that "I think it's it's inevitably gonna be part of how restaurants do business. I ~~don't~~don't know how long it's it's going to ~~taleetake~~ to get there. I think some have wanted to do

1 it because from a philosophical standpoint they completely embrace it but from a mathematical
and/or emotional standpoint in terms of leadership, they ~~haven't~~haven't quite figured out how to
do it."
~~out how to do it."~~2

~~25~~ He said the first time patrons experience it "there is actually a moment
~~29~~

where you have sticker

shock ~~..."...."~~ He said that he is ~~"~~sad when a restaurant earnestly tries it

~~2~~ and cannot figure out the math~~."~~ He said that ~~"~~one of the worst things about tips, ~~it's~~it's a drug,

~~3~~ and people cannot get off

the drug. You start waiting tables as a tipped employee usually to

~~4~~ put yourself through some

other thing you are pursuing, and you make so much money ~~..."...."~~ that

you end up waking up twenty years later and your career that you were first interested in

passed you by ~~..."...."~~. Meyer ~~said~~ stated that he believes that in 10-ten or 15 years, no-tipping will be the ~~"~~industry

~~7.8~~ ~~8~~ norm~~."~~

~~154. As of the date of this First Amended Complaint, at least ten of USHG's restaurants have implemented hospitality included, including: Cafe 2 at MOMO, Cafe Marchio, Daily Provisions, Gramercy Tavern, Maialino, Marta, Martina, North End Grill, The Modern, Vini Fritti, and Union Square Cafe. USHG's website says that "our other New York restaurants will continue the change throughout 2017."~~

~~155. On or about September 27, 2017, Tarlow announced that tipping would be eliminated and prices would be increased at Diner and Marlow & Sons effective October 2, 2017.~~

~~156. On October 17, 2017, Grub Hub reported that hospitality included has had a substantial negative impact on server compensation, contrary to what Meyer said at the time of implementation, and that "people have left the company in droves [and] staff morale has dropped considerably." According to the article, the income of one USHG server dropped \$10,000 annually following implementation of hospitality included.~~

~~157. In February 2018, Momofuku instituted a no-tipping policy at Momofuku Ko in New~~

25 — ~~York City~~
26 — 158. — In or around **February 2018**, Meyer said for the first time that USHG lost about 30 to
27 — 40 percent of its "legacy front of the house staff" as a direct result of the implementation of
28 —

hospitality included. As of the date of the original Complaint, USHG's website says that servers will not make less under hospitality included. Meyer also said that "it's not right" and "it's not fair" that USHG's compensation for its kitchen workers increased only twenty-five percent since 1985.¹¹

159. Switching to a hospitality included model is a complex process. According to one industry consultant:

Minimum wage hikes are on the horizon for many of our clients and this changes everything for the restaurant industry. Menu prices must go up and tips could possibly be a thing of the past. Our online resources and staff are here to help you determine the best steps to take to maintain a profitable business ... If the hospitality included model is one that you are exploring, then you likely realize the necessity to reevaluate and devise new budgets, a new business plan, and even a new break-even analysis. Revisiting this part of your business may be reminiscent of when you first opened your doors. Not to worry. [Our] leading teams comprised of industry experts in restaurant accounting, menu engineering, and labor management will help guide you through the transition.

160. Competing restaurants in other locations have agreed to implement a no-tipping

model. For example, in Portland, Oregon in the summer of 2016, a group of restaurants ended tipping and increased prices by about 18 percent, and used the gratuity-free logo referenced in

Par. 82, above. One of the owners was quoted saying: "My overall hope is that this will

¹¹ During the same period, consumer prices increased by approximately 130 percent through inflation.

~~slowly evolve in the restaurant industry.... A lot of restaurateurs are talking about this right now. Almost every restaurateur I know this is one of the first things on their mind." And it was reported that in Minneapolis in or around February 2017, a "who's who of local restaurateurs" met "in a back room ... in a really out of the way space" and discussed no-tipping/higher prices as a response to minimum wage hikes. One attendee reportedly said that "it seems like they are trying to keep it quiet."~~

~~a~~ 161 San Francisco Restaurants Are Also Colluding on "Health Care" Surcharge

65. Upon information and belief, dozens of restaurants in San Francisco ~~"collectively"~~

~~agreed to impose surcharges after the city enacted legislation in 2008 requiring certain employers to provide health insurance for their employees. Trou Normand and Bar Agricole~~

~~currently charge a five percent surcharge purportedly "to support San Francisco employer mandates."~~

~~Upon information and belief, much of defendants' price-fixing activity has been conducted in secret. Formal discovery should reveal additional evidence of price fixing and defendants' real motives and efforts to conceal their illegal conduct.~~

1315 ~~19~~ **VII. CLASS ALLEGATIONS**

16266. This suit is brought as a putative class action pursuant to Fed.R.Civ.P. 23. The class is defined as:

All persons who purchased food or drinks from a defendant restaurant as early as 2014 during the period when any such restaurant had in place a no-tipping policy and consequently increased its menu prices or added a surcharge.

Excluded from the class are past or present owners, officers, managers, or corporate

employees of defendant restaurants, ~~GORA~~ GGRA and the ~~Alliance, and the~~ judge and

magistrate assigned to
this matter, and their law clerks.

67. The alleged class is so large that joinder of all members is impracticable.

68. Questions of fact and law common to all class members predominate over questions
affecting only individual class members. Among the common factual and legal questions:

a. Whether the defendants agreed with one another and/or with others to
increase

prices at their establishments.

b.

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Whether the defendants agreed with one another and/or with others to end tipping at their establishments.

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d. Whether the defendants implemented the agreed-upon price increases, and when.

e. The identity of co-conspirators not made defendants in this action.

e. 5 f. The specifics of meetings and other communications in furtherance of the

charged conspiracy (e.g., date, location, participants and witnesses, who said what).

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ken to conceal the conspiracy.

h. Actions taken to portray the conduct as legal and in the public interest.

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i.

Whether the class incurred an antitrust injury, and

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j. The proper measure of injury and damages.

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69. These common issues are central to the litigation. The only significant factual question

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not common to the class as a whole is the specific amount of damages each class member

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13 incurred. The amount of damages can be determined from credit card records and other

14 2 evidence of purchases.

15 3 16670. The claims of the proposed class representative ~~is~~are typical of the claims of the putative

16 4 class members. There are no ~~mlique~~unique defenses that apply to the proposed class representative

17 that do not apply equally to other class members.

18 16771. The proposed class representative will fairly, adequately, and diligently represent and

19 a protect the interests of the class.

20 9 16872. The proposed class representative does not have any interest in conflict with or

21 antagonistic to the interests of other class members.

22 73. The prosecution of separate actions by individual class members would create a risk of

23 inconsistent adjudications and could overburden the courts. Further, individual cases may be

24 impractical and too costly relative to the potential recovery. In the absence of a class action, defendants may retain the benefits of their wrongful conduct and the charged conspiracy may

25 continue unabated.

26 74. Defendants have acted on grounds generally applicable to the putative class, thereby

27 making appropriate final injunctive and declaratory relief with respect to the class as a whole.

75. The proposed class representative has retained competent counsel experienced in class action litigation and antitrust litigation.

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VIII. CAUSES OF ACTION

COUNT 1: VIOLATION OF FEDERAL SHERMAN ACT

(15 ~~U.S.C.~~ U.S.C. §1)

(~~Against All Defendants~~)

~~75-76.~~ The preceding paragraphs are re-alleged in full and incorporated herein.

~~76-77.~~ The Sherman Act makes unlawful ~~"every~~ contract, combination in the form of trust or

~~otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with~~

~~foreign nations~~ ~~"..."~~ 15 U.S.C. Section 1.

~~17378.~~ Horizontal price fixing is a *per se* violation of the Sherman Act, and the purported

reasonableness of the fixed price or claimed motive of the participants is immaterial.

~~17479.~~ Each defendant is jointly and severally liable for the entirety of the damages caused by the conspiracy. All defendants are liable regardless of whether Brown made purchases at each defendant.

~~17580.~~ As discussed herein, beginning in or around the fall of 2014, defendants knowingly negotiated formed, entered into, and joined a price-fixing conspiracy, and subsequently acted in concert to put the agreement into effect by ending tipping and increasing prices at their establishments.

81. The charged conspiracy has and continues to impact and affect interstate commerce,

and has occurred and continues to occur within the flow of interstate commerce. ~~The~~

~~defendants are located in California and New York.~~ Representatives of ~~USHG~~ USHG travelled to San

Francisco, Austin, Charleston, Denver, Chicago and

other locations to facilitate the conspiracy. Defendant Vogler traveled to Chicago to facilitate

the conspiracy. A representative of Docu

GGRA traveled to New York City in furtherance of the
conspiracy. Tarlow A New York-based no-tipping proponent developed a "gratuity-

free logo used by

restaurants in New York, California and Oregon, among other places. Upon Defendants

information and belief, some restaurant owners who attended USHG town halls in New York

City do business outside the State of New York. Conspirators in California communicated

with conspirators like-minded restaurateurs in New York City via electronic means and

social media in support of the conspiracy. Many members of

the putative class are domiciled in a state other than the state where they incurred damages.

The defendant outside California and have traveled to California where they patronized the
restaurants at

issue. The restaurants at issue purchase food and drink products manufactured outside the state in

of California which the restaurant is located and were shipped across state lines into
the state in which the California.

restaurant is located.

177. The extensive factual allegations not mere conclusions in the First Amended

Complaint meets the plausibility pleading standard explained by the Supreme Court in *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

178. Because conspirators typically do not document or announce their illegal agreements

in public, direct evidence of a conspiracy is rarely obtainable at the pleading stage. "To

require that each private plaintiff have personal knowledge of the legal and factual intricacies

of an alleged national

82. The class representative and putative class members were overcharged on their
purchases from defendant restaurants as a result of the conspiracy would impair at least to some
degree the ability of private

citizens, and are entitled to augment by private actions governmental enforcement of
Congress's will."recover

Bogosian v. Gulf Oil Corp., 337 F. Supp. 1234, 1235-36 (E.D. Pa. 1972).

treble their actual damages, as well as their costs and reasonable attorneys' fees, pursuant to the
Clayton Act, 15 U.S.C. Section 15(a).

83. The charged conspiracy necessarily did operate partly in public, is ongoing, as it continues
to require local and direct visiting diners to

evidence pay higher prices in lieu of concerted action voluntary tipping, and collusion among and
between the thus injunctive relief requiring defendants is to some

extent already available as noted through the plentiful meetings, correspondence and public

statements discussed herein. Further evidence will be discovered as to the defendants'

participation in withdraw from the conspiracy.

~~The conspirators have a shared purpose and common interest, in that, as acknowledged,~~

~~by several defendants herein, a no-tipping policy would not likely succeed on a large scale without concerted action by multiple participants in the restaurant community. Only by working together could the defendants achieve their long-term objective of transforming the industry.~~

**COUNT 2: VIOLATION OF CALIFORNIA CARTWRIGHT
ACT (California Business and Professions Code § 16720, et
seq.)**

84. The preceding paragraphs are re-alleged in full and incorporated herein.

85. Defendants entered into and engaged in an unlawful contract, combination, and conspiracy in restraint of trade as described above.

86. Defendants' conduct is a violation of California Business and Professions Code Sections 16720, *et seq.*, also known as the Cartwright Act.

~~86-87.~~ The class representative and putative class members were overcharged on their

purchases from defendant restaurants as a result of the conspiracy, and are entitled to recover treble their actual damages, ~~and together with their~~ costs and reasonable ~~attorneys'attorneys'~~ fees, pursuant to ~~the Clayton~~

~~Act, 15 U.S.C. Section 15(a).~~

~~the Cartwright Act.~~

88. The charged conspiracy is ongoing, ~~as it continues to require local and visiting diners to pay higher prices in lieu of voluntary tipping,~~ and thus injunctive relief requiring defendants to

~~withdraw from the conspiracy, is necessary, appropriate and in the public interest.~~

**COUNT 2: VIOLATION OF CALIFORNIA CARTWRIGHT ACT
(California Business and Professions Code § 16720, et seq.)
(Against All California Defendants¹²)**

183. The preceding paragraphs are entitled "Hypotheticals" and "Hypotheticals."
184. Defendants entered into and engaged in an unlawful contract, combination, and
conspiracy in restraint of trade as described above.

185. Defendants' conduct is a violation of California Business and Professions Code
Sections 16720, *et seq.*, also known as the Cartwright Act.

² The California defendants are: Trou Normand, Bar Agricole, Vogler, Camino, Moore,
Hopelain, Comal, Paluska, and Hoffman.

~~186. The class representative and putative class members were overcharged on their~~
~~purchases from defendant restaurants as a result of the conspiracy, and are entitled to recover~~
~~treble their actual damages, and costs and reasonable attorneys' fees pursuant to the~~
~~Cartwright Act.~~

~~187. The charged conspiracy is ongoing and thus injunctive relief requiring defendants to~~

~~formally withdraw from the conspiracy is necessary, appropriate and in the public interest.~~

COUNT 3: VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW

(California Business and Professions Code §§ 17200, et seq.)

~~(Against All California Defendants)~~

~~188.~~ 89. The preceding paragraphs are re-alleged in full and incorporated herein.

~~189. Defendants~~ 90. Defendants' price-fixing conduct constitutes unfair competition and unlawful and

fraudulent business acts and practices in violation of California Business and Professional

Code, Sections 17200 *et seq.*

91. Defendants intend by their actions to impair and injure competition between and among them, and to increase prices to the detriment of consumers, and to reduce and suppress wages to the detriment of their servers and other customarily-tipped employees.

92. ~~Defendants'~~³ ~~California's~~³ violation of the Cartwright Act also constitutes a violation of California's California's

Unfair Competition Law.

93. As a result of ~~defendants'~~³ violations of the California Business and Professions Code,

~~Section~~³ ~~Sections~~³ 17200 *et seq.*, they have unjustly enriched themselves at the expense of the class

representative, ~~the~~³ proposed class, and servers and other customarily-tipped employees.³ The

unjust enrichment continues to accrue as the unlawful, unfair, and fraudulent business acts

_____ and

practices continue.

_____. To prevent this unjust enrichment, defendants should be required, pursuant to Business

and Professions Code Sections 17203 and 17204, to disgorge their illegal gains for the

purpose

of making full restitution to all injured class members. Defendants should also be

permanently enjoined from continuing their violations of the California Business and

Professions Code.

95. The acts and business practices alleged herein constitute a continuing course of unfair

competition by means of unfair, unlawful, and fraudulent business acts and practices within the

meaning of California Business and Professions Code, Sections 17200, *et seq.*, including,

_____ but

not limited to, violations of the Cartwright Act.

COUNT 4: VIOLATION OF NEW YORK DONNELLY ACT

(New York General Business Law § 340)

(Against All New York Defendants¹³)

195. The preceding paragraphs are re-alleged in full and incorporated herein.

196. The Donnelly Act provides that contracts, agreements, arrangements, or combinations

in restraint of trade are unlawful. The Act is interpreted consistent with the Sherman Act with

respect to horizontal price-fixing agreements.

¹³ The City of New York, New York, USDO, Meyer, Logar, Huertas, Hospitality, C. Medina,
27 Momofuku, Chang, Marlow, Tarlow, Happy Cooking Hospitality, Stulman, Huertas, Miller,
28 Adler, Eleven Madison Park, Humm, Guidara, NYC Hospitality Alliance, and Rigie.

197. The evidence indicates that the New York defendants engaged in unlawful price fixing

by, *inter alia*:

a. Aiding and abetting the price fixing activity in the California as discussed

herein;

b. Meeting in secret with each other and with other restaurateurs and reaching a

consensus to increase prices and end tipping at their establishments; and

c. Providing assistance and "best practices" to restaurants in New York and

elsewhere interested in switching to a no tipping model; and

d. Increasing prices and eliminating tipping as agreed upon.

198. The violation of the Donnelly Act has caused and continues to cause pecuniary injury

and damages to plaintiff and the proposed class, as well as to servers and other customarily

tipped employees who work or have worked at defendant restaurants in New York and

California

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on his behalf and on behalf of the defined class ~~pray, prays~~ that this Court enter judgment on his behalf and on behalf of the class and order that:

1. The ~~Court~~ Court has personal jurisdiction over all named defendants;

2. This action is certified as a class action pursuant to Federal Rule of Civil Procedure 23,

and the defined class is as stated in the Complaint;

3. Defendants shall pay the costs and expenses of a court-approved notice program

designed to notify putative class members of their claims;

²⁵ 4. The charged conspiracy violates the Sherman Act, the California Cartwright Act, and
the

[±]
²⁵²⁶ ² California Unfair Competition Law, ~~and the New York Donnelly Act;~~

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5. Plaintiff and the class members shall recover threefold their actual damages, in addition to pre-judgment and post-judgment interest, costs and reasonable attorneys' fees;

5.6 Defendants must fully withdraw from the conspiracy and otherwise be fully enjoined from

further participation; and

5. The Court should make further findings and award further relief as is just and proper and in the public interest under the circumstances.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b)(1), plaintiff hereby demands a trial by jury on all matters triable by jury.

Date: March 9, 2018

January 28, 2019 MAILLY
LAW OFFICES OF ANDREW WOLFF, P.C.

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David Lavine
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TIMOTHY BROWN

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